

NOMINATION OF SUSAN W. LIEBELER
TO BE U.S. CIRCUIT JUDGE
FOR THE FEDERAL CIRCUIT

R E P O R T

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

together with
ADDITIONAL VIEWS



JULY 14 (legislative day, JULY 8), 1988.—Ordered to be printed

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CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT

JULY 14 (legislative day, JULY 8), 1988.—Ordered to be printed

Mr. BYRD (for Mr. BIDEN), from the Committee on the Judiciary,
submitted the following

REPORT

together with

ADDITIONAL VIEWS

The Committee on the Judiciary, to which was referred the nomination of Susan W. Liebeler to be U.S. circuit judge for the Federal Circuit, reports the nomination to the full Senate, without recommendation.

I. CHRONOLOGY AND COMMITTEE ACTION

On January 7, 1986, the resignation of Judge Shiro Kashiwa as U.S. circuit judge for the Federal Circuit became effective. On March 23, 1987, President Reagan nominated Susan W. Liebeler of California to fill the vacancy created by Judge Kashiwa's resignation.

The Committee on the Judiciary held hearings on the nomination of Ms. Liebeler on August 6 and November 3, 1987. Senators Pete Wilson of California and Phil Gramm of Texas introduced the nominee to the committee at the August 6 hearing. The nominee testified under oath at both hearings. At the November hearing, testimony was also taken from the following witnesses: David O. Elliott, president, accompanied by Frederick Ikenson, chairman, Judicial Selection Committee, Customs and International Trade Bar Association; Clarence T. Kipps, Jr., chairman, Judicial Selection Committee, Federal Circuit Bar Association; and Robert S. Swecker, president, International Trade Commission Trial Lawyers Association. In addition, extensive materials submitted by the nominee and by other interested parties were included in the hearing record, including the nominee's responses to written questions submitted by the committee.

On February 4, 1987, the Committee on the Judiciary convened in executive session. At that time, the nomination of Ms. Liebeler was held over for action at the committee's next business meeting. The next meeting occurred on February 23, 1987. After brief debate, Senator Thurmond moved that the committee report the nomination favorably to the full Senate. That motion was defeated on a roll call vote of 6 to 7, as follows:

VOTE ON MOTION TO REPORT FAVORABLY

<i>AYES</i>	<i>NOES</i>
Senator Thurmond	Senator Kennedy
Senator Hatch	Senator Byrd (by proxy)
Senator Simpson	Senator Metzenbaum
Senator Grassley	Senator DeConcini
Senator Specter	Senator Leahy
Senator Humphrey	Senator Heflin
	Senator Simon (by proxy)

Senator Thurmond then moved that the committee report the nomination without recommendation. This motion carried by a roll call vote of 8 to 5, as follows:

MOTION TO REPORT WITHOUT RECOMMENDATION

<i>AYES</i>	<i>NOES</i>
Senator DeConcini	Senator Kennedy
Senator Heflin	Senator Byrd (by proxy)
Senator Thurmond	Senator Metzenbaum
Senator Hatch	Senator Leahy
Senator Simpson	Senator Simon (by proxy)
Senator Grassley	
Senator Specter	
Senator Humphrey	

Chairman Biden was absent due to illness and did not vote on either motion.

II. BIOGRAPHICAL INFORMATION

A brief résumé of the nominee's educational and professional background, prepared by the Justice Department, follows. Further details may be found in the nominee's responses to the Judiciary Committee's questionnaire for judicial nominees. The publicly available portion of these responses will be printed with the hearing record on this nomination.

SUSAN LIEBELER

Birth: July 3, 1942..... New Castle, Pennsylvania.
 Legal Residence: Malibu, California, and Falls Church, Virginia.
 Marital status: Married Wesley James Liebeler, three children.
 Education:
 1960-63 University of Michigan, B.A. degree.
 Summer 1961 Harvard University.
 Summer 1962 Harvard University.
 1963-64 University of Michigan Law School.
 1964-66 UCLA Law School, LL.B. degree.

SUSAN LIEBELER—Continued

Bar:	
1967	California.
1972	Vermont.
Experience:	
1966-67	Judicial Clerk, Hon. Gordon Files, California Court of Appeals.
1967-68	Gang, Tyre & Brown, Associate.
1968-70	Greenberg, Bernhard, Weiss & Karma, Associate.
1970-71	Republic Corporation, Associate General Counsel.
Summer 1971	John Burgess, Esq.
Summer 1972	Brattleboro, Vermont.
1972	Sole practitioner.
1973-74	Verit Industries, General Counsel, January to August 1973. Consultant, August 1973 to May 1974.
1973-84	Loyola Law School, Professor of Law.
1984 to present	International Trade Commission, Commissioner; Vice Chairman, June 1984 to June 1986; Chairman, June 1986 to June 1988.

III. DISCUSSION

The testimony taken by the committee on the nomination of Susan Liebler, and the voluminous submissions by the nominee and interested parties, focus on two principal concerns about the nominee's fitness to serve as a U.S. circuit judge.

First, the committee has received numerous criticisms of the nominee's record in her current position as Chairman of the International Trade Commission (ITC). One knowledgeable Member of Congress, for example, has charged that the nominee's "tendency to give greater weight to ideological predilection than to congressional intent raises serious questions about her nomination to serve on the federal bench." (Letter of Representative Don J. Pease to Chairman Biden, June 18, 1987, at 2.) This criticism—essentially, that the nominee lacks the objectivity, open-mindedness and fidelity to congressional intent that are necessary for effective service as a federal judge—is addressed in section A below.

Second, the committee is concerned about the nominee's involvement in certain questionable incidents, both before and since her service on the ITC. The facts of these incidents raise serious questions about the nominee's judgment and temperament, and the explanations she gave about one of them in particular—her 1973 arrest in Vermont on extortion charges—raise questions about her candor. These matters are addressed in section B below.

A. CONCERNS ABOUT THE NOMINEE'S OBJECTIVITY AND OPEN-MINDEDNESS, AS REFLECTED IN HER RECORD AT THE ITC

1. INTRODUCTION

The record before the committee on Ms. Liebler's performance as a Commissioner, and later as Chairman, of the ITC raises several concerns. It may be useful to state at the outset what the principal concerns are, and what they are not.

The nominee's interpretation of the trade laws under which the ITC operates may be of concern to individual Senators as a matter of policy. But the committee does not consider these policy questions particularly relevant to the nominee's fitness to serve as a U.S. circuit judge. Nor is it relevant to this nomination that some Senators may have preferred that certain cases decided by the ITC had been decided differently.

The concern relevant to this nomination is whether Ms. Liebler has demonstrated a capacity to put aside her own ideological preconceptions of what the trade laws *should* say, and instead taken as her touchstone the decisions made by Congress about what the trade laws *do* say and mean. Put another way, the issue is whether her record at the ITC demonstrates an objective application of the facts of each case to the expressed intent of Congress and the precedents of the ITC itself and of its reviewing courts; or whether, by contrast, that record demonstrates an attempt to force the governing statutes into the mold of the nominee's own economic views and political ideology. Objectivity and faithfulness to the expressed will of Congress are the issues; trade policy is not the issue.

An evaluation of one item of evidence before the committee illustrates this distinction. The committee has reviewed a statistical analysis prepared at the request of the House Ways and Means Committee that appears to demonstrate that, at least in certain categories of cases, the nominee's decisions fall, by a considerable margin, at one end of the spectrum, as compared with the votes of her fellow Commissioners. For example, in final ITC determinations in antidumping cases, Ms. Liebler has voted affirmatively (i.e., to find a violation of the antidumping laws by foreign interests) only 15 percent of the time. One other Commissioner voted affirmatively in 30 percent of the cases, while all four other Commissioners who served during this period voted affirmatively between 59 and 85 percent of the time. Similarly, on countervailing duty (CVD) cases, the nominee voted affirmatively (i.e., found an illegal subsidization of imports) in 3 percent of the cases; one other Commissioner voted affirmatively 11 percent of the time, while the other Commissioners found a violation in 50 to 91 percent of the cases.

These statistics, standing alone, are not particularly illuminating of the issues of concern to the committee on this nomination. A voting record falling at one end of the spectrum may be explained in several ways. It could reflect the nominee's objective application of the specific facts of each case to an objective view of the requirements established by Congress. On the other hand, it could reflect an ideological predisposition to achieve a certain result—in this case, a minimization of protection for domestic manufacturers—and a willingness to stretch or bend the directives of Congress in order to reach that result.

The committee has sought to determine which explanation of this voting record applies in this case. It recognizes that the technicalities of the trade laws are not matters within its special expertise, and therefore it has considered the views of recognized experts, both within Congress and in the private sector, on the proper interpretation of this record. These experts do not agree, and the committee's attempt to resolve the disagreements among them did

not reach a definitive conclusion. However, the committee found that there is a substantial basis for the charge that the nominee's record at the ITC reflects a willingness to force the expressed intent of Congress, and the applicable precedents, into the mold of the nominee's preconceived ideas of what the trade laws should say. This recognition led a majority of the committee to oppose a favorable recommendation to the Senate on this nomination.

The committee notes that this concern about objectivity and ability to subordinate ideological biases and preconceptions is not a new one with respect to this nominee. It was of concern to the Finance Committee in its protracted consideration of her nomination to the ITC during the 97th and 98th Congresses. As one member of the Finance Committee recently stated on the Senate floor:

I opposed Ms. Liebel's nomination to the ITC, as did a number of other members of the Committee. Based on my private meeting with her and her responses in the hearings the committee held, I concluded at the time that she was unfamiliar with trade law and appeared to have little interest in learning more about it or congressional intent with respect to it. I believed she would use her position at the Commission to advance her own ideological approach to trade issues in defiance of the law and the facts, and I believe subsequent history has proved my fears correct. (Cong. Rec. S 17005 (daily ed., December 2, 1987) (statement of Senator Heinz).)

When her nomination to the ITC was before the Finance Committee, the nominee assured that committee that in rendering decisions, she would endeavor to put her strongly-held personal beliefs aside, and apply the law as it is written and as it has been authoritatively interpreted. The issue of the nominee's record at the ITC is, essentially, the issue of whether she has carried out that pledge. The nominee's critics charge that she has not fulfilled that pledge, and the record before the Judiciary Committee demonstrates that that charge, while vigorously contested, has not been successfully refuted.

Finally, the committee notes that an evaluation of the nominee's record at the ITC is particularly relevant to the circumstances of her nomination to the U.S. Court of Appeals for the Federal Circuit. While, of course, the ITC is not a court, there are striking similarities between its jurisdiction and that of the court to which Ms. Liebel has been nominated. Both tribunals have been established primarily to interpret and apply provisions of complex and specialized federal statutes. The ITC's jurisdiction is limited to certain trade laws. The jurisdiction of the Court of Appeals for the Federal Circuit embraces the Internal Revenue Code, the patent laws, the Civil Service Reform Act, and other complex statutes; in addition the court reviews certain decisions of the ITC under the trade laws. In most of these fields, the jurisdiction of the court is exclusive of all other federal appellate courts.

Like other federal courts of appeals, decisions of the court to which Ms. Liebel has been nominated are rarely reviewed by the Supreme Court. Unlike the other courts of appeals, the Federal Circuit is rarely called upon to decide constitutional questions, and

almost never bases its decisions upon state or common law, as other federal courts must do in diversity cases. In the vast majority of cases, the question before it is the application of congressional directives to complex factual situations. If, indeed, the criticism that Ms. Liebeler has shown insufficient fidelity to congressional intent is well founded, then the deleterious effects of such an approach to the primary mission of the Court of Appeals for the Federal Circuit—to provide uniform and accurate interpretations of federal statutory law in complex and specialized fields—would be particularly undesirable.

2. THE CONCERNS OF THE CRITICS

The concerns raised by the nominee's record at the ITC have been well stated in several letters submitted to the committee, and in public documents available to it.

As noted above, Representative Don J. Pease, a senior member of the House Ways and Means Committee's Trade Subcommittee, expressed his concern in a letter to Chairman Biden on June 18, 1987. Representative Pease stated in part:

In the course of my duties as a member of the House Ways and Means Subcommittee on Trade, I have become familiar with Chairman Liebeler's record at the International Trade Commission. Her voting record and case opinions amount to a marked departure from the Commission's reputation for non-partisan, faithful administration of U.S. trade remedy laws.

Representative Pease concluded:

To my mind, Chairman Liebeler's tendency to give greater weight to ideological predilection than to congressional intent raises serious questions about her nomination to serve on the federal bench. * * * If her record at the Commission is any guide, Ms. Liebeler's presence on the Court would further undermine public confidence in the fairness and impartiality of the trade laws, and, by extension, the open international trading system.

These observations of a leading member of the subcommittee with both legislative and oversight responsibilities over the ITC and the laws it administers have been carefully considered by the committee.

Representative Pease's letter also notes that "the trade bill reported by the House Ways and Means Committee includes specific language to proscribe some of the [nominee's] unorthodox practices." The committee has examined the provisions referred to by Representative Pease, along with the accompanying reports of both the House Ways and Means Committee and the Senate Finance Committee. These bills and reports include language that the nominee acknowledges is specifically directed at her interpretations of the trade laws, particularly in the field of antidumping cases. Transcript of hearing of 11/3/87 (hereafter cited as "11/3 Tr.") at 27. In the words of the Senate Finance Committee, these provisions

are generally clarifications of current law and of original Congressional intent with respect to current law. These changes are believed necessary because certain Commissioners may not be applying the law in accordance with Congressional intent. * * * (S. Rept. 100-71, at 115. The report of the House Ways and Means Committee includes similar language. H. Rept. 100-40, at 128.)

As noted above, a leading member of the Senate Finance Committee has recently expressed his concern about the nominee's fairness and objectivity in applying the trade laws as an ITC commissioner. Senator Heinz concluded in his recent floor statement on this nomination:

To put it simply, Mr. President, I believe Mrs. Liebeler's record at the Commission is one of consistently distorting both the letter and spirit of U.S. law to suit her own ideological preconceptions, which happen not to be in the mainstream of current economic or legal thinking. (Cong. Rec. S 17005 (daily ed., December 2, 1987).)

The nominee's fidelity to congressional intent has also been sharply questioned by some of her fellow Commissioners. As Commissioner Alfred Eckes stated in one of his ITC opinions, in an apparent reference to the nominee:

The net effect of some of my colleagues' reasoning has been to discard the carefully crafted statutory tests and to revise the law by administrative fiat. In my view, the Commission's statutory findings cannot and should not be made by improvising a host of dubious, arbitrary and illegitimate analytical techniques, such as "proxies," "presumptive tests," and "elasticities," to rationalize negative determinations. The statute is generally clear, and those of us charged with administering it have no business substituting academic fictions for the factual record and our own judgment.

* * * * *

To me the new revisionism is a threat to the fairness, predictability, and integrity of our trade law system. In devising substitutes for the statute, the revisionists offer the parties only proxies, presumptions and abstractions, not the certainty of consistent statutory interpretation. Parties—both domestic and foreign—cannot be sure what factors will be dispositive when statutory standards are explained away, bent, or simply disregarded. (*Certain Ethyl Alcohol from Brazil* (ITC Inv. Nos. 701-TA-239 and 731-TA-248) USITC Pub. 1818 (March 1986), at 54-55 (views of Commissioner Eckes).)

3. EVALUATIONS BY BAR ASSOCIATIONS

The committee has given careful consideration to the detailed report filed by the Customs and International Trade Bar Associa-

tion (CITBA). CITBA presented to the committee a 19-page report¹ which found the nominee "not qualified to serve as a judge on the Court of Appeals for the Federal Circuit" because she "lacks the necessary objectivity and judicial temperament." (CITBA Report, at 2.) With respect to the nominee's performance at the ITC, CITBA concluded that

a review of Mrs. Liebler's opinions filed in antidumping, countervailing duty and unfair act [citation omitted] cases leads to the conclusion that Mrs. Liebler consistently decides cases based on her belief as to what the law ought to be rather than on the basis of criteria enunciated in the statutes. * * * [She] consistently rejects the guidance of the Congress as set forth in the [relevant] statutes and replaces it with decisional criteria of her own creation. (*Id.* at 6-7.)

Because the nominee, some of the supporters of her nomination and some members of the committee, have criticized the CITBA report, the committee would offer the following comments concerning it.

The Customs and International Trade Bar Association is a well-established and well-respected organization, more than half a century old, whose members engage in the practice of international trade and customs law, and appear frequently before the ITC. With respect to ITC practice in particular, CITBA's president testified that most of CITBA's members represent import interests, though a substantial minority represent domestic industries. (11/3 Tr., at 65.) The expertise of CITBA's members in trade litigation, and the range of interests they represent, certainly suggest that this organization has the potential to make a valuable contribution to the committee's consideration of nominations to courts, such as the Court of Appeals for the Federal Circuit, whose jurisdiction includes trade law matters.

In the committee's view, that potential has been realized. Over the past several years, CITBA has consistently commented—usually favorably—upon the qualifications of nominees to the Court of International Trade and the Court of Appeals for the Federal Circuit, and has frequently raised important issues for the committee's consideration.

The committee has welcomed CITBA's contributions to the process of selecting federal judges. But, according to CITBA, that contribution has not always been welcomed by the other principal participant in the judicial selection process, the Department of Justice. At a hearing on another Federal Circuit nomination held on May 13, 1987, CITBA representatives testified that the Justice Department has discouraged at least some nominees from cooperating with the evaluative efforts of voluntary bar associations, including CITBA.

If indeed the Justice Department has followed a practice of discouraging input from expert voluntary bar associations such as CITBA into the judicial selection process for these courts, the com-

¹ The full text of the CITBA report will be printed in the hearing record. Additionally, the full text may be found at pages S17006-08 of the *Congressional Record* of Dec. 2, 1987.

mittee urges the Department to reconsider its position. In any event, the existence of such a short-sighted practice underscores the importance of careful consideration by the committee of the views of voluntary bar associations, such as CITBA, as well as the Federal Circuit Bar Association and the ITC Trial Lawyers Association, which also offered testimony on this nomination.

At the hearing on November 3, 1987, all three of these bar associations offered testimony, and their representatives were questioned by the committee concerning the bases for their conclusions. That record clearly reflects that the investigation leading up to CITBA's report was extensive and conscientious. CITBA's judicial screening committee conducted 30 to 40 interviews, including trade practitioners, all the nominee's fellow Commissioners, "numerous" ITC staff members, and other individuals with knowledge of the nominee's qualifications. It also reviewed her decisions as an ITC Commissioner. A draft report was circulated and debated within CITBA, and the organization's board of directors voted almost unanimously to adopt the report later submitted to the committee. (Tr. 11/3, at 65-66, 70-71, 85-89.) The Federal Circuit Bar Association, by contrast, conducted an unascertained number of interviews, which did not include any other ITC Commissioners or staff; one of the members of its judicial evaluation committee reviewed the nominee's ITC decisions; and an oral report was made to the board of directors. (*Id.* at 66-68, 70.) The ITC Trial Lawyers Association conducted no interviews, and polled its board of directors, which endorsed the nomination with some dissent. (*Id.* at 68-70.) Finally, the testimony and submitted report of the CITBA was quite extensive, including a summary of its interviews, a review of the nominee's opinions in three major areas of law, and other material.

The only bar association which submits to the committee an evaluation of every judicial nominee is the American Bar Association. The ABA's investigative and evaluative process, which has been described to this committee on several occasions, is quite extensive and thorough. However, several members of the committee have, at various times, criticized the fact that for lower court nominations, the ABA provides no explanation whatever of the reasons for its evaluation, except in the unusual case in which a majority of the ABA Standing Committee on the Federal Judiciary concludes that a nominee is unqualified.

The committee commends the format of the report prepared by the Customs and International Trade Bar Association as a model that other bar associations may wish to emulate if they desire to make a more meaningful contribution to the advice and consent process for nominees to the lower federal courts. The CITBA report on this nomination clearly states the reasons for its conclusions, and identifies particularly matters which the organization believes the committee should take into account in its action on the nomination. Members of the committee may disagree with some or all of its conclusions, but it nevertheless represents a sincere effort by knowledgeable lawyers to make the committee's consideration of this nomination better informed and more focused on the relevant issues.

In reaching this conclusion, the committee neither embraces all of the findings of the CITBA report, nor denigrates the efforts of the Federal Circuit Bar Association, or the ITC Trial Lawyers Association. The CITBA report does contain errors and imperfections, some of which the organization itself has candidly acknowledged to the committee. The other bar associations which have contributed to this process have also made a sincere effort to inform the committee of the reasons for their conclusions. Their testimony before the committee was informative and has been carefully considered.

Finally, the committee has considered the criticisms of the interview process followed by the CITBA. One statement submitted to the committee on behalf of the nominee expresses the criticism as follows:

I must express genuine alarm at that portion of the CITBA paper (at pages 3-5) that purports to quote largely derogatory remarks by an unstated number of people whom the CITBA Board claims to have "interviewed." None of the interviewees is named. In no instance is the quoted remark put in any context. We are not even given the question to which any given remark responded. This denies Commissioner Liebeler even the rudiments of fair play. One has to go back to hearings in the early 1950s by a very different Senate committee to find a submission that stoops to such a level. Written testimony of Richard O. Cunningham, at 3.

The committee has considered the quoted criticism, and others to the same effect. It concludes that these criticisms are misplaced, and reflect a fundamental misapprehension of the realities of the committee's investigation of judicial nominees.

Certainly the committee would prefer that every comment, pro or con, that is submitted to it with regard to a judicial nomination would be made on the record and for attribution. Unfortunately, that is rarely the case. Often the best sources of information about the qualifications of a nominee are lawyers who either have practiced before, or worked with, the nominee in his or her current position, or who would expect to appear before the nominee if he or she is confirmed. It is exceedingly common for such lawyers, especially if their comments are critical of the nominee, to refuse to comment on the record or for attribution.

Many of the individuals interviewed in the course of the committee's investigation of any judicial nomination demand and expect confidential treatment of their identities and of the information they provide. The same is true of many of the persons interviewed by the FBI in the preparation of background investigations on potential nominees. It is equally true of persons interviewed by bar associations as part of their nominee evaluation process. The American Bar Association's Standing Committee on the Federal Judiciary, for example, conducts *all* of its interviews on a confidential basis, and gives the following explanation of this practice:

In investigations involving both the Supreme Court and the other federal courts, it is essential that the [ABA] Committee assure its sources that their identities will not

be revealed outside the Committee. It is the Committee's experience that only by assuring and maintaining such confidentiality can sources be persuaded to provide full and candid information. (American Bar Association, "Standing Committee on the Federal Judiciary: What It Is and How It Works," at 10.)

The ABA, in fact, has relied upon the need to maintain complete confidentiality as its principal reason for almost invariably declining to provide the Judiciary Committee with the reasons underlying its evaluations of judicial nominees.

The practice adopted by CITBA in the case of this nomination differs from the ABA position in that CITBA provides the committee with some of the comments elicited from confidential sources, but does not attribute them to particular individuals. This method provides the committee with a limited amount of additional information about how the nominee is viewed by at least some of those in a position to evaluate her qualifications. Standing alone, these unattributed comments do not tell the committee very much, but they are of some value in evaluating her reputation in the legal community of which she is a part.

It is quite understandable that the recitation of these comments from confidential sources creates a frustrating situation for the nominee. But the situation she faces of being unable to respond specifically to unattributed comments is not unique in the judicial confirmation process. A nominee who has been rated unqualified by the ABA Standing Committee, or even by a minority of that committee, is under a similar disability to respond to negative comments, or even to do more than speculate as to whether any were made and if so by whom. Furthermore, since every investigation by the Judiciary Committee involves the collection of numerous comments made under a promise of confidentiality, the committee's decision, whether positive, negative, or, as in this case, without recommendation, is almost always based in some part upon statements which are not disclosed to the nominee.

That observation is particularly relevant in this case. The committee staff conducted an extensive independent investigation of Ms. Liebeler's qualifications, including confidential interviews with every one of her fellow Commissioners, numerous senior staff of the ITC, and many trade practitioners from the private sector. The assurance of confidentiality was essential to obtaining frank and uninhibited comments from many of these sources.

Fairness requires that every nominee have the opportunity to respond to all substantive issues raised by opponents of the nomination. This nominee has had that opportunity, and has availed herself of it in plenitude. She responded orally at the hearing on November 3 to some aspects of the CITBA report. After the hearing, she submitted a more detailed response. Her post-hearing submissions ran to a total of about 400 pages. Numerous letters and other documents critical of the CITBA report, or of other submissions in opposition to her nomination, have been included in the hearing record.

The committee emphatically rejects the suggestion made by some of the supporters of this nomination that the committee's proceed-

ings have been somehow tainted by the fact that some, or more likely all, of the bar associations which have evaluated the nominee relied in part upon comments made in confidence by persons with knowledge of her qualifications and fitness for the bench.

4. SPECIFIC CONTROVERSIAL INTERPRETATIONS OF THE TRADE LAWS

a. The "five-factor proxy test" for causation in dumping and countervailing duty cases

Perhaps the most controversial of the nominee's interpretations of the trade laws is her approach to the issue of causation in dumping and countervailing duty (CVD) cases before the ITC.

The trade laws do not penalize all "dumping" (i.e., U.S. sales by foreign producers at prices below their home market price). Some such sales—for example, those made at a price not below the U.S. market price—may not be the cause of material injury to a U.S. industry within the meaning of the trade laws. Section 771(7)(B) of the Tariff Act identifies the three major factors for the ITC to consider in determining whether imports are causing or threatening to cause material injury to U.S. producers: import volume, the effect of imports on U.S. prices for like products and the impact of imports on domestic producers. Section 771(7)(C) identifies particular matters the ITC must consider in evaluating these three factors, including whether the imported merchandise has significantly undercut the U.S. market price, and whether imports have significantly depressed U.S. market prices, or suppressed price increases which would otherwise have occurred. The ITC is also authorized by statute to consider other "relevant economic factors" in making its causation determinations.

Ms. Liebler's approach to causation was set forth in her June 1985 decision in the case of *Red Raspberries from Canada*, Inv. No. 731-TA-196 (Final), USITC Pub. No. 1707 (June 1985). She has applied the *Red Raspberries* approach consistently in causation inquiries, not only in dumping cases, but also in CVD cases, which concern subsidized imports. Because the *Red Raspberries* analysis is one of the nominee's most controversial interpretations of the trade laws, it is worth quoting from her decision at some length.

The nominee's *Red Raspberries* opinion proceeds from the premise that the operative statutory language, summarized above, provides the ITC with "not much guidance" in making its causation analysis in dumping cases. (*Id.* at 12.) Therefore, in her view, "the Commission must delve further to find out what evil Congress has attempted to remedy." (*Id.* at 13.) After quoting one sentence from the Senate Finance Committee report accompanying the 1974 Trade Reform Act, the nominee draws the following conclusions:

The focus of the causation analysis must be on whether the material injury suffered by a domestic industry is by reason of price discrimination. Thus, "the Antidumping Act does not proscribe transactions which involve selling an imported product at a price which is not lower than that needed to make the product competitive in the U.S.

market, even though the price of the imported product is lower than its home market price.²

Price discrimination can take several forms.³ The fact that Congress referred to *unfair* price discrimination suggests to believe that Congress meant some type of predatory pricing. Predatory pricing is a form of strategic behavior in which a firm lowers the price of its product below the marginal cost of production. Such behavior is only rational if the firm expects to be able to raise its prices in the future to a level at which it can more than recoup the losses it suffers in the present. Thus, predatory pricing can only be practiced by firms that have or expect to have market power.

Ideally, the Commission would develop data on the cost of production of the foreign firms accused of dumping. Unfortunately, cost data is difficult to develop, even in domestic antitrust cases.⁴ In the absence of such information, the Commission must look to relevant proxies. I believe that market share and pricing trends are the appropriate subjects for examination. Although this information is not dispositive of the predation issue, large and growing market share and deteriorating price trends are necessary conditions for a predatory behavior.

The fact that the statute indicates that import volume (in absolute terms or relative to production or consumption) and effects on price are the causation factors to be relied on lends credence to the analysis above. As noted, price discrimination cannot be effective in the absence of market power. Market share provides a first indication as to whether a firm has market power.⁵ Moreover, as a firm is attempting to drive out its rivals, one would expect to see prices decline as domestic firms attempt to survive. Because a direct inquiry into the intent of a foreign producer would be difficult at best, volume and price data provide useful proxies.

This determination must be made on a case-by-case basis. The stronger the evidence of the following, however, the more likely that an affirmative determination will be made: (1) large and increasing market share, (2) high dumping margins, (3) homogeneous products, (4) declining prices and (5) barriers to entry to other foreign producers (low elasticity of supply of other imports). *Red Raspberries*, at 14-16.

The nominee's *Red Raspberries* causation analysis has generally been interpreted as a statement that conduct actionable under the antidumping statutes is limited to predatory dumping. On that basis, the *Red Raspberries* approach has been widely criticized by

² *Id.*

³ See generally R. Posner, *Antitrust* 98-99, 680 (2d ed. 1981).

⁴ Moreover, there is some disagreement among economists concerning what cost data to use and upon whom the burden of proof should be to present such data.

⁵ An inquiry into the presence or absence of barriers to entry is also relevant to a determination of whether market power exists. Congress did not explicitly provide for such an inquiry, but neither did it preclude it.

trade law experts as inconsistent with legislative intent and ITC and judicial precedent. Perhaps the most telling criticism has been leveled by the congressional committees which write the trade laws and have oversight responsibility for the ITC. The Senate Finance Committee, in its report on the trade legislation recently passed by Congress, made the following statements, which the nominee appears to concede are directed to her analysis of causation, and to her application of some of the "five factors:"

The Committee disapproves of determinations by individual Commissioners that rely upon the mechanical application of factors or formulas that remain constant from case to case, but are not enumerated in [the statute]. Any such determinations should be scrutinized with particular care by the Commission's reviewing courts for conformity with the intent of Congress as expressed in this amendment. * * * The Committee intends to disapprove a narrow interpretation of the term "price undercutting" to refer only to *predatory pricing behavior* whereby a firm lowers its price to drive out competitors in order to gain market power. * * * The change of wording in the statute is intended to clarify that the dumping and countervailing duty laws are not intended to reach only instances of predatory pricing. A foreign producer may have no reasonable hope of obtaining market power, yet may cause material injury to a United States industry through below-market prices. The Committee also believes that not all price differences can be explained by differences in the merchandise. A foreign producer may sell merchandise that is commercially identical to U.S.-producer merchandise at prices that are significantly lower than the U.S.-produced merchandise. (S. Rept. 100-71, at 116-17. The report of the House Ways and Means Committee includes similar criticisms. H. Rept. 100-40, at 128.)

The *Red Raspberries* analysis has also attracted criticisms from other sources. An article that appeared in a recent edition of the law journal, "Law and Policy in International Business," canvassed the relevant legislative history and concluded that the *Red Raspberries* analysis has the effect of reading into the statute an intent requirement that Congress specifically removed more than 60 years ago. The author also states flatly that "not one of these five criteria is within the letter or the spirit of the law." Jameson, "Recent International Trade Commission Practice Regarding the Material Injury Standard: A Critique," 18 Law & Policy in Int'l Business 517, 552, 553-60 (1986). See also CITBA Report, at 7-10 (nominee "reads into the statute [a predation requirement] which cannot be found in its text").

The criticisms of the five-factor proxy test made by one of the nominee's fellow ITC Commissioners, Alfred Eckes, have already been quoted. Commissioner Eckes summarized his criticisms in his opinion in the case of *Certain Ethyl Alcohol From Brazil* as follows:

I reject the notion that one may apply a "proxy," or substitute, for an unambiguous statute that spells out specific

criteria. * * * Nor is it likely that Congress intended for Commissioners to stray far from the specific statutory criteria and to rely in the absence of compelling circumstances on the phrase "all relevant factors" as an invitation to substitute abstract economic models for specific criteria designated in the statute. (*Certain Ethyl Alcohol From Brazil*, supra, at 45.)

Because of this background of controversy about the causation analysis employed by the nominee in her ITC decisions, the committee questioned her closely about this issue at the hearing on November 3. The questioning focused on two aspects of this issue: first, whether the five factors the nominee employs in causation analysis in antidumping and countervailing duty cases are supported by or consistent with the statute; and second, her view of the relevance of predatory intent to the causation analysis in these cases.

i. Statutory basis for the five factors

At the outset, the nominee testified that her use of the term "proxy" to describe the five factors has been misinterpreted:

I used the word "proxy" as an economic term of art, as an economic signal or indicator * * * of causation * * * I did not use proxy in the term that I think you are interpreting it, as a substitute, and at the time I used it it never occurred to me that someone would interpret the use of the word proxy that way. (11/3 Tr. at 11.)

The nominee took the position that two of the five factors are specifically authorized by the statute. The other three, in her view, are encompassed within the statutory authorization that the ITC may consider "relevant economic factors" or "other factors." See e.g., the nominee's post-hearing submission ("Sub.") at 7 (product homogeneity).

1. "Large and increasing market share." (See 11/3 Tr. at 12, Sub. at 5.) The nominee testified that this factor equates to "volume of imports * * * relative to production or consumption in the United States," a specifically authorized statutory factor. (See 19 U.S.C. 1677(b)(1).)

2. "High dumping margins." (See 11/3 Tr. 12-13, Sub. 6.) The nominee conceded that this factor is not specifically mentioned in the statute, but pointed out that its use by the Commission has been approved by a reviewing court, the Court of International Trade (CIT).

3. "Homogeneous products." (See 11/3 Tr. 13, Sub. 7.) Although this factor does not appear in the statute, the nominee considers it a relevant economic factor, and stated that "no court has ever held to the contrary." (Sub. 7.)

4. "Declining prices." (See 11/3 Tr. at 13, Sub. 7-8.) The nominee equates this to the statutory direction to the ITC to examine the effect of dumped or subsidized imports on U.S. prices.

5. "Barriers to entry of other foreign producers." The nominee considers this an unspecified "relevant economic factor." She con-

cedes it is not mentioned in the statute. (See 11/3 Tr. at 13-14, Sub. at 8.)

The nominee's post-hearing submission "stress[es] * * * that each of these factors is just a tool I use to determine * * * whether [imports] are causing harm to American industry." (Sub. at 8.)

The nominee's elucidation of her view of the statutory authority for the use of these five factors is not entirely satisfactory. As noted above, the committees in both Houses of Congress that wrote the trade laws recently expressed concern about whether this approach "conform[s] with the intent of Congress." Analysis of the nominee's testimony does not allay that concern.

It is open to dispute whether the statutory language upon which the nominee relies for explicit authorization of two of her five factors can properly bear the weight she would impose on it. For example, the language she has quoted to justify her first factor may equate to her term of "market share," but it does not seem to require that the market share of imports be "large and increasing." Similarly, her fourth factor, "declining prices," appears to ignore the statutory directive that one element of a causation finding may be price suppression, in which prices are increasing but not as much as they would in the absence of unfairly traded imports.

As to the three factors which the nominee concedes are not explicitly authorized by the statute, similar questions remain. She notes that the second factor, "high dumping margins," has been approved by the Court of International Trade; but, as noted below in the discussion of cross-cumulation, she also takes the position that the decisions of that court are not binding upon the ITC beyond the specific case before the court.

As to the fourth factor, "homogeneous products," the committee notes that not only has the nominee's use of this factor been criticized, but so has her application of it in specific cases. In at least one case, *Agricultural Tillage Tools from Brazil*, the nominee apparently looked to price differentials to establish lack of homogeneity:

When goods are perfect substitutes, price can provide a lower bound for the substitutability. The greater the difference in the price of competing goods, the more they differ. *Agricultural Tillage Tools from Brazil*, Inv. No. 701-TA-223 (Final), USITC Pub. No. 1761 (Oct. 1985), at 26.

This puzzling application of the homogeneity factor would appear to support the circular reasoning that if imported products undersell domestically produced products (other than agricultural commodities which are fungible), the products must not be homogeneous. In other words, the existence of an essential fact in showing price discrimination—lower prices for imported goods—would, pursuant to the nominee's analysis, simultaneously suggest the non-existence of one of the five factors she looks to to establish that the price discrimination is "unfair," and hence a violation of the anti-dumping laws.

The nominee's fifth factor, "barriers to entry of other foreign producers," is considered in more detail below, in the discussion of the decision in *USX v. United States*.

ii. *Relevance of predatory intent*

At the hearing, the nominee repeatedly denied that she requires evidence of predatory pricing or other predatory behavior or intent in order to find a violation of the antidumping laws. (See 11/3 Tr. at 9-11, 18.)

This issue was the subject of extensive written questions after the hearing. (See Nominee's Post-Hearing Answers ("Ans.") at 1-11.) The committee asked the nominee to explain a passage in the *Red Raspberries from Canada* decision in which she refers to "some sort of predatory pricing" as the type of price discrimination Congress meant to prohibit in enacting the antidumping and countervailing duty laws. Her opinion, quoted above, also refers to "the predation issue" as to which she argues that certain information is relevant, and to the use of "volume and price data" as "useful proxies" for "a direct inquiry into the intent of a foreign producer." She was also asked to explain a passage from her opinion in another case in which she implied that a finding of causation would depend on the existence of a "factual setting in which the LTFV [less than fair value] or subsidized sales take place [which would] support [some] rational self-serving goal to be served by predatory pricing." (*Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela*, Inv. Nos. 701-TA-242 and 731-TA-252 (Preliminary), USITC Pub. No. 1680, at 27.)

The nominee responded that the antidumping laws prohibit unfair price discrimination, not predatory pricing, but that "confusion may arise" because these two tests have "some elements in common." The five factors "would often be sufficient conditions for unfair price discrimination, but would never be sufficient by themselves to show predatory pricing." (Ans. 2-3.) "The conduct addressed by the antidumping laws is price discrimination which is something similar to predatory behavior." (Ans. 5.)

The nominee was asked to explain "the predation issue," which she identified in her *Red Raspberries* decision as crucial to causation analysis. She responded that "the 'predation issue' is the over-riding issue of predatory pricing which I discussed in an attempt to provide a context for understanding Congress' concern with unfair pricing discrimination. * * * The language in my opinion tries to provide an economic rationale or explanation (in terms of its relation to predatory pricing) for concern about unfair price discrimination." (Ans. 6.)

When asked to explain her comment in the same decision that certain factors are "useful proxies" "because a direct inquiry into the intent of a foreign producer would be difficult at best," the nominee replied that the intent of a foreign producer "is *not* relevant in a dumping or countervailing duty case." (Ans. 7 (emphasis in original).)

Finally, the nominee noted that because of the "similarity" between unfair price discrimination under the trade laws and predatory pricing, "perhaps I could have explained the distinctions more clearly in my early opinions." She described her reference to predatory pricing in the opinion involving steel imports from Thailand and Venezuela as "a way to think about inferences to be drawn from the evidence in the record," and as "a context within which

to assess the inferences to be drawn from other 'facts.' (Ans. 9-11.)

iii. Evaluation of the nominee's interpretation

The thrust of the criticism of the nominee's causation analysis is that she employs factors unauthorized by the Congress (the "five-factor test" issue) in order to limit the application of the antidumping and countervailing duty laws in a way contrary to Congressional intent (the "predation" issue). The nominee's testimony and post-hearing submissions, summarized above, seek to refute the charge, made by the Congressional trade committees, some trade practitioners and some of her fellow ITC commissioners, that she has misinterpreted the trade laws in this fashion. After reviewing the entire record, including this testimony and these post-hearing submissions, the committee was unable to conclude that the charge has been successfully refuted.

The nominee's testimony and post-hearing submissions are difficult to square with the plain language of her decisions, particularly *Red Raspberries*, with its recurring references to "the predation issue," and its argument that "proxies" are needed because of the impracticability of "a direct inquiry into the intent of a foreign producer." The nominee told the committee that, under the framework Congress has established, the foreign producer's intent is irrelevant to the causation issue, and that predatory pricing need not be shown to establish causation. Yet any objective reading of her opinions could certainly lead the reader to the opposite conclusion about her views. The committee is not prepared to say that the numerous well-informed observers who have reached that conclusion are misreading her opinions, although conceivably they could be misinterpreting her real views about the trade laws.

The committee credits the nominee's testimony, taken under oath, that she employs the five-factor test as a tool for the application of the legal standards established by Congress, rather than other standards of her own devising. But it finds that her testimony raises another serious issue that goes to the heart of her qualifications to serve as a U.S. circuit judge.

As previously noted in this report, one of the central missions of the Court of Appeals for the Federal Circuit is to provide authoritative and uniform guidance to lawyers, litigants and citizens about their rights and responsibilities under complex statutes enacted by Congress. The nominee's opinions as a member of the ITC suggest that she has reached conclusions about the intent of the trade statutes which her testimony appears to contradict. While it may "never have occurred to [her]," 11/3 Tr. at 11, that her opinions on causation analysis would be read the way that they have been read by many knowledgeable observers, that circumstance has indeed occurred.

The nominee insists that these observers have gained from reading her opinions an inaccurate understanding of her actual views on interpretation of the trade laws. She may be correct. But if she is confirmed as a U.S. circuit judge, lawyers and litigants will have to glean from her opinions authoritative guidance about the interpretation of many complex federal statutes, both within and without the trade arena. Even if the committee were to credit the nomi-

nee's testimony that her ITC opinions have been consistently misread, the committee is concerned about whether the nominee's judicial opinions are likely to provide a sufficiently clear picture of her real views on important matters of statutory interpretation.

At the time of the committee's consideration of the Liebeler nomination, the criticisms leveled at her causation analysis emanated principally from those who have written the trade laws (the congressional trade committees) and some of those who apply those laws in their law practices and their duties as Commissioners of the ITC. The committee reached its conclusions without the benefit of the views of those federal courts charged with reviewing the nominee's decisions for fidelity to legislative intent in the field or causation analysis. At the time, these courts had not had the opportunity to render any decisions reviewing the nominee's activities in this field. Since the committee acted, however, a decision has been rendered by the Court of International Trade (CIT) which addresses precisely this question. The conclusion of the decision is that the nominee's five-factor analysis, as applied in this case, is inconsistent with the intent of Congress.

The decision was handed down on March 15, 1988, by Judge Jane Restani of the CIT in the case of *USX Corporation v. United States*, Court No. 85-03-00325. In this case, the CIT reviewed a decision of the ITC in a case involving imports of steel products from Argentina and other countries. USX petitioned the ITC for relief under the antidumping laws. The ITC made a negative determination in 1985, which was remanded by the court to the ITC in 1987. The decision rendered on March 15 reviewed a second ITC determination in the matter. Chairman Liebeler was one member of a four-person majority in the ITC's decision after the first remand. Judge Restani stated that:

in order for the Commission's determination to be upheld in this court, the court must be able to discern from the determination that a majority of the Commission has based its conclusions upon legally sufficient reasoning.
[Citation omitted.]

The causation analyses separately set forth by at least two of the commissioners in the four person majority do not satisfy this standard of review. (*USX*, slip op. at 4. One of the two commissioners referred to by Judge Restani was Chairman Liebeler, and much of the 38-page opinion is devoted to a review of her application of causation analysis in this case.)

Judge Restani begins this section of her opinion by noting that Chairman Liebeler recited, in her determination on remand, the five factors set forth in her *Red Raspberries* opinion. Evidently the nominee found that three of the factors in this case were consistent with an affirmative finding, but concluded that "these factors are outweighed by the absence of barriers to entry, and the fact that cumulated import penetration is very low, which strongly suggests the absence of unfair price discrimination.'" *Id.* at 6, quoting the nominee's determination on remand. The CIT opinion then examines the nominee's findings on these two "determinative factors * * * low import volumes and no barriers to entry." *Id.* at 7.

On the import volume factor, the court made the following statement:

In the previous opinion, the court recognized that import volume alone cannot be used to gauge accurately the effect of imports in the cold-rolled steel industry. The court directed ITC on remand to explain the significance of import volume or its relationship to other facts uncovered in the investigation. *USX*, 655 F. Supp. at 490-91. The limited discussion of market penetration presented here offers no such explanation. Instead, it is stated that, "[c]umulated imports accounted for less than 1 percent of apparent U.S. consumption during 1981, then increased to 1.4 percent in 1982 and 2.0 in 1983 [while] [i]mport penetration was 3.4 percent in January-September 1984 compared to 1.9 percent in the corresponding period of 1983." Remand Determination at 15. It is then concluded that, "[t]he cumulated import penetration of Argentina and Korea is very small and not consistent with a finding of unfair price discrimination." *Id.* This conclusory statement does not support a negative determination. It leaves unanswered the question of how the volume of imports relates to injury, particularly in the sense of the third statutory factor, impact on the domestic industry. (*Id.* at 7-8. This portion of Judge Restani's opinion will be discussed in more detail in subsection B below.)

Judge Restani's analysis of the final factor, barriers to entry, is worth quoting at length:

An attempt is made in the determination to justify use of the five factor test and reliance on barriers to entry, in particular, as the determinative factor, by equating unlawful dumping with a particular form of "unfair price discrimination." In *Red Raspberries*, cited in this determination in support of the five factor analysis, it is more specifically explained that the antidumping statute is intended to protect U.S. industry only from unfair price discrimination in the form of predatory pricing, as that term is defined in the determination. *Red Raspberries*, USITC Pub. 1707, at 13-14 (citing the legislative history of the Trade Act of 1974 (1974 Act), S. Rep. No. 1298, 93rd Cong. 2nd Sess. 179, reprinted in 1974 U.S. Code Cong. & Admin. News 7186, 7316). The *Red Raspberries* determination goes on to state that:

Price discrimination can take several forms. The fact that Congress referred to *unfair* price discrimination suggests to believe that Congress meant some type of predatory pricing. Predatory pricing is a form of strategic behavior in which a firm lowers the price of its product below the marginal cost of production. Such behavior is only rational if the firm expects to be able to raise its prices in the future to a level at which it can more than recoup the losses it suffers in the

present. Thus, predatory pricing can only be practiced by firms that have or expect to have market power.

Red Raspberries, USITC Pub. 1707, at 14-15 (footnote omitted) (citing R. Posner & F. Easterbrook, "Antitrust," 98-99, 680 (2d ed. 1981)). The problem with this position is two-fold. One flaw is that this view necessarily makes the intent of a foreign producer the focus of the ITC causation inquiry. Another, but not unrelated flaw, is that this view seems to assume that the purpose of the antidumping statute is to prevent a particular type of "injury to competition" rather than merely material "injury to industry."

The "injury to industry" versus "injury to competition" distinction in international trade laws dates back to the early part of this century. The Antidumping Act of 1916 (codified at 15 U.S.C. §§ 71-77 (1982)) was enacted by Congress as an unfair competition law focusing specifically on the practice of predatory dumping. See Hiscocks, "International Price Discrimination: The Discovery of the Predatory Dumping Act of 1916," 11 Int'l Law. 227 (1977). The 1916 Act imposed criminal sanctions on anyone importing articles into the United States:

[A]t a price substantially less than the actual market value or wholesale price * * * *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

15 U.S.C. § 72 (1982). Although the Act mentions injury to industry, the entire thrust of the statute, including the intent requirement, cause it to be recognized as a particular type of antitrust statute. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1190, 1223, (E.D. Pa. 1980), *aff'd, in part, reversed, on other grounds, and remanded, sub nom., In re Japanese Electronics Products Antitrust Litig.*, 723 F.2d 319 (3d Cir. 1983), *cert. denied* 55 U.S.L.W. 3730 (April 27, 1987) (No. 86-1453); 723 F.2d at 325 & n.4.⁶

In the Antidumping Act of 1921, however, Congress inserted an injury test considerably more sensitive to conditions in the domestic industry. Antidumping Act of 1921, ch. 14, § 201, 42 Stat. 11 (repealed 1979) (formerly codified, as amended, at 19 U.S.C. § 160(a) (1976)). Likewise, the Trade Agreements Act of 1979 (1979 Act), which repealed the 1921 Act and re-enacted its provisions, as amended, into the Tariff Act of 1930, states that antidumping duties are to be imposed only upon a showing that a domestic industry is materially injured, threatened with material

⁶ In an appeal from a separate opinion of the third circuit in that case, the Supreme Court declined an invitation to review the decision regarding the Antidumping Act of 1916. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 579 n.3 (1986).

injury or that the establishment of a domestic industry is materially retarded by reason of less than fair value imports. 19 U.S.C. § 1673 (1982).

As indicated, the interpretation under discussion of the antidumping statute reflects a belief that despite the lack of express limitation in the statutes, Congress intended that dumping duties be enforced only if a certain form of anticompetitive behavior is occurring. The analysis begins with the assumption that foreign firms behave as rational profit maximizers. From this assumption follows the statement that:

[I]f the factual setting in which the unfair imports occur does not support a finding that there is any gain to be had by unfair price discrimination, it is reasonable to conclude that any injury or threat of injury to the domestic industry is not "by reason of" such imports.

Remand Determination at 13.⁷ To fully comprehend the impact of this statement it is important to note the additional comments that unfair price discrimination is predatory pricing in the form of pricing below the marginal cost of production and that no gain can be had by such price discrimination unless an exporting firm ultimately is able to raise its prices in the U.S. market to take advantage of its increased market share. *See supra* p. 9 (quoting from *Red Raspberries*, USITC Pub. 1707, at 14-15). It is further stated that a firm will be unable to raise prices if other nations are capable of exporting to the U.S. at competitive prices. Under this analysis, gainful dumping cannot be accomplished and, therefore, proof of causation of injury by dumped imports will not exist, unless there are barriers to entry of other imports. Thus, contrary to defendants' argument, this fifth factor is not just one of many relevant factors, but its absence likely will produce a negative determination in all cases relying solely upon the five factor test.⁸

The view reflected in the determination rests upon the principle that pricing that is above the marginal cost of production cannot be said to be contrary to acceptable profit maximizing behavior, as a general matter. *See* R. Posner & F. Easterbrook, "Antitrust," 380-686 (2d ed. 1981);⁹ Barceló, "Antidumping Laws as Barriers to

⁷ In *Red Raspberries*, an additional reason was given as to why the absence of like product imports from other countries would support an affirmative finding on causation, namely that "it provides some assurance that the injury to the domestic industry is by reason of the investigated imports and not caused by imports from other countries." USITC Pub. 1707, at 17. In this case, however, this explanation of barriers to entry appears for the first time in defendants' brief in support of the remand determination and it does not appear that the significance of barriers to entry was analyzed in this manner. Furthermore, the statement made in *Red Raspberries* in 1985 may have contemplated standards for cumulation which have been held to be contrary to law.

⁸ This is demonstrated in this case because only the fifth factor is available to relate volume to price effect and impact to produce a negative result. The other factors were affirmative.

⁹ This work is relied upon in *Red Raspberries* which has been cited as a fuller statement of the views expressed here, thus the court assumes that the definition of marginal cost of production contained therein is also accepted. It is "change in total costs brought about by increasing (or decreasing) output by one unit." Posner & Easterbrook, *supra*, at 684.

Trade—The United States and the International Anti-dumping Code," 57 Cornell L. Rev. 491, 504-06 (1972). Under this view, only pricing below the marginal cost of production can be said, with any certainty, to be uneconomic and anticompetitive. Thus, by asking whether, rationally, goods would be priced below the marginal cost of production, the commissioner asks whether the pricing is unacceptably anticompetitive, not whether it is injurious to the industry in some other material way.¹⁰

In international trade it is the object of an "injury to competition" causation test to protect the competitive process itself and not necessarily individual competitors. See Barceló, *supra*, at 513-17. Under the view expressed in the determination, only predation of the type described furnishes the requisite causation of injury to competition.¹¹ The "injury to industry" causation standard, however, focuses explicitly upon conditions in the U.S. industry. *Id.* In effect, Congress has made a judgment that causally related injury to the domestic industry may be severe enough to justify relief from less than fair value imports even if from another viewpoint the economy could be said to be better served by providing no relief. The court, by finding the test applied here invalid, does not condemn for all cases any inquiry into effects on competition; such inquiry can be a useful way of exploring the causation issue. Such an inquiry, however, cannot supplant the inquiry required by statute. Thus, any causation analysis must have at its core the issue of whether the imports at issue cause, in a non *de minimis* manner, the material injury to the industry which has been found.¹²

To avoid confusion regarding the legislative history cited in the determination, further comment is needed on the concept of rational profit maximization. As noted, at the core of the five factor analysis is the assumption that all producers act as rational profit maximizers. It is not universally accepted, however, that producers of goods for export always act in such a manner. In recent years, many foreign export industries have been nationalized, or at least subjected to increasing political pressures. It has been stated that these industries no longer seek to enhance profits as much as they attempt to pursue national social goals such as full employment. See Fisher, "Dump-

¹⁰ The Supreme Court in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 599 (1986) observed that "predatory pricing schemes are rarely tried, and even more rarely successful." (The court was concerned with a claim of conspiracy under section one of the Sherman Act, but its discussion of predatory pricing was more general.) Congress certainly has been aware of the scope and complexity of administration of the antidumping laws, so much so that it frequently has amended such laws and has approved considerable spending to keep elements of government functioning to carry out those laws. Presumably, Congress, in approving such legislation, intended to protect industries in the United States from something other than a rare and unusual occurrence.

¹¹ Others who favor the "injury to competition" approach might recognize as injurious behavior which does not reach the level of predation described.

¹² Defendants argue that ITC has applied the proper standard because it found injury to industry. This is true, but if its causation analysis relates only to injury to competition in the form of predatory pricing as defined here, ITC has ignored its basic finding.

ing: Confronting the Paradox of Internal Weakness and External Challenge," 1 Mich Y.B. Int'l. Legal Stud. 11, 19-23 (1979). Exporters who do not act as rational profit maximizers might be willing to sell at less than fair value even though there is no foreseeable potential for gaining an increased market share and raising prices. Such behavior could cause permanent, continuing injury to the domestic industry, contrary to the view discussed. The commissioner apparently believes that Congress did not intend to address any such problem that might exist.

In support of the rational profit maximizer approach, the commissioner quotes from the legislative history of the 1974 Act, S. Rep. No. 1298, *supra*, at 179: "importers as prudent businessmen dealing fairly would be interested in maximizing profits by selling at prices as high as the U.S. market would bear." Remand Determination at 12-13. The statement, however, was not placed in the legislative history to establish an axiom about the conduct of producers of exports or to impose an injury by predation standard. It appeared in the context of a general discussion about "technical dumping," which occurs when foreign imports' margins of underselling exist because there is a shortage of supply in the U.S. market. S. Rep. No. 1298, *supra*, at 179. By adopting the language of this section out of context as support for the entire predatory pricing analysis, the determination expands the concept of technical dumping to include any case in which there are no barriers to entry. The court believes that analysis from the point of view of rational profit maximization is necessary in many situations, but the seeming acceptance of this view by Congress in some instances does not support the application of the five factor analysis used here. Even if one agrees that one must assume rational profit maximizing behavior, it does not follow necessarily that one must also accept an injury by predation standard. Rational profit maximizers might engage in behavior which is injurious to an industry in a way that cannot be described as predatory in the sense used here but is nonetheless prohibited by the anti-dumping laws.

As indicated, the commissioner has expressly cited ITC's *Red Raspberries* determination as a fuller statement of the views expressed here. There it is stated that statutory causation factors such as volume and pricing data are nothing more than "useful proxies" for a "direct inquiry into the intent of a foreign producer [which] would be difficult at best." *Red Raspberries*, USITC Pub. 1707, at 16. As stated, it is the 1916 Act which focuses on intent. In applying the antidumping law under which this action is brought it is improper for ITC to place at the center of its causation analysis the intent of a foreign producer. This inquiry is unavoidable, however, if one equates unlawful dumping with unfair price discrimination in the form of predatory pricing. Unlike the 1916 Act, there is neither a scienter requirement to be found in the statute relevant here, nor

evidence in the relevant legislative history that Congress intended such a requirement. Thus, contrary to the suggestion in defendants' brief, what occurred in this case is not the mere incorporation of another relevant economic factor into a causation analysis as is clearly permissible under 19 U.S.C. § 1677(7)(B)-(C) (1982). Instead, the nature of the reliance on the barrier to entry factor has worked to change the focus of the injury investigation in a manner not permitted by Congress. (*Id.* at 8-17.)

The conclusion reached by the Court of International Trade in this case is fully consistent with, and indeed strongly buttresses, the criticisms of the nominee's causation analysis which the committee considered in its deliberations on this nomination. Judge Restani concluded that the nominee's causation analysis proceeds from a fundamental misapprehension of a cornerstone of modern trade law, the congressional decision in 1921 to focus the antidumping laws on "injury to industry" rather than the more abstract economic concept of "injury to competition." In Judge Restani's view, the nominee's five factors practically boil down to one factor—the fifth, barriers to entry—and that the application of this analysis seeks to "supplant the inquiry required by statute." (*Id.* at 14.) Judge Restani further concluded that the nominee's analysis is based on passages of legislative history that have been taken out of context. In sum, "the nature of the reliance on the barrier to entry factor has worked to change the focus of the injury investigation in a manner not permitted by Congress." (*Id.* at 17 (emphasis added).)

The *USX* case is the sole instance in which the nominee's causation analysis has been subjected to scrutiny by the federal courts. That scrutiny resulted in a determination that the nominee's causation analysis involves the subordination of the explicit and well-documented directives of Congress to other economic models which Congress did not direct the ITC to rely upon. The committee commends this opinion to the Senate in its consideration of this nomination.

b. Market share presumption

The nominee's decisions in dumping and CVD cases brought before the ITC have been controversial in another, related area. In several of these decisions, the nominee has argued that "absent unusual circumstances, such as highly inelastic supply and demand," (11/3 Tr. at 42), imports should be presumed not to be the cause of material injury to U.S. industry unless imports from the source under investigation amount to at least 2.5 percent of the relevant market. The nominee has expounded this market share presumption in several cases, notably *Certain Welded Carbon Steel Pipes and Tubes From Thailand and Venezuela*, *supra*, (hereafter referred to as *Welded Carbon Steel*), decided in April 1985, and subsequent decisions. As she conceded at the hearing on November 3, 1987, this presumption is not found anywhere in the statute or its legislative history. (11/3 Tr., at 42-43.)

The committee is aware of sharp criticism of this market share presumption analysis from several sources. For example, Senator Heinz, in a letter to the nominee dated March 11, 1985, character-

ized the use of this presumption as an "arbitrary conclusion," asserted that it was inconsistent with the ITC's past decisions, described it as "factually and legally inappropriate," and concluded that the nominee's use of this presumption "casts doubt upon [her] commitment" to "the integrity of the process by which cases are decided." The CITBA report cited the market share presumption as an example of the nominee's "abandonment of statutory criteria . . . in favor of the criteria which she believes Congress should have adopted." (CITBA Report, at 11-12.) The presumption was characterized in a letter from six presidents of national labor unions to Chairman Biden as "without statutory basis and . . . contrary to long-standing Commission precedent." (Letter of Owen Bieber, Jack Sheinkman, William Bywater, Jay Mazur, Richard Trumka and Lynn Williams to Chairman Biden, July 21, 1987, at 2.)

When questioned about her use of the market share presumption in the hearing on November 3, 1987, the nominee offered the following testimony. The nominee stated that her goal was to "find a standard that I could articulate that would indicate that a player was so small that the player could not have much impact or any impact in a market." (11/3 Tr. at 43.) The nominee conceded that the presumption did not derive from the statute or legislative history, but explained that after "read[ing] a whole lot of Commission cases before that time," she "decided that 2.5 percent was such a standard" that she uses "as sort of an economic presumption," rather than a "presumption of law." (*Id.*) She testified that the standard was neither supported nor precluded by Commission precedent, and declined to comment on decisions predating her tenure on the Commission in which the ITC found causation when imports commanded substantially less than 2.5 percent market share.

In the *Welded Carbon Steel* case, the nominee gave two reasons for employing the presumption. The first, as the nominee testified before the committee, is that imports which do not meet this 2.5 percent test are "small, and therefore highly unlikely to have more than an inconsequential or insubstantial adverse impact on the domestic industry." (*Welded Carbon Steel*, at 19-20.) The second reason given is that "such market share is very likely to signify a competitive process and to reflect only dumping or subsidization in a "technical sense." (*Id.* at 20.) An examination of this second rationale for the market share presumption reveals that it is closely akin to the nominee's justification for using the "five-factor proxy test" discussed in the preceding section: the need for the ITC to distinguish between predatory dumping and other dumping or subsidization practices which, in her view, are not prohibited by the statute. Thus, the nominee's discussion in *Welded Carbon Steel* of the second rationale for the market share presumption concludes as follows:

An assertion of unfair price competition in the form of dumping or subsidization should be accompanied by a factual record which can support such a conclusion. Foreign firms and governments exporting to the United States should be presumed to be rational. Actions which they

take should be presumed to be in their self-interest. Therefore, if the factual setting in which the LTFV or subsidized sales take place do not support any rational self-serving goal to be served by predatory pricing, it is reasonable to conclude that such sales must be credited to one of the three benign explanations, and injury to the industry should not be treated as being "by reason of" such imports.

In most cases, predatory pricing by a competitor would be irrational. An examination of the wheat farming industry illustrates this point. One of the reasons that it would be irrational for a wheat producer to undersell the market and thereby drive out his competition is that he could never hope to grow large enough to ever raise his price above the market price by dint of his now greater market power. Similarly in the various markets which we examine, it is reasonable to conclude that unless a foreign firm has a fairly large market share, it cannot hope that by charging *less* than the market price it can drive out competitors and thereby gain the requisite market power to charge *more* than the competitive equilibrium price. I have chosen a conservative market share of less than 2.5 at a preliminary proceeding as inconsistent with even the most optimistic rational expectation of gaining an advantage by selling at less than the market price. (*Id.* at 27-28.)

A portion of Judge Restani's opinion for the Court of International Trade in the *USX* case, cited in the preceding section, is relevant here. As noted above, on pages 7 and 8 of that opinion, Judge Restani reviewed the nominee's application of the "import volume" factor which Congress directed the ITC to consider. (As noted in the preceding section, the nominee equates this factor to the first of her five "proxy" factors, "large and increasing market share.") The court wrote:

In the previous opinion, the court recognized that import volume alone cannot be used to gauge accurately the effect of imports in the cold-rolled steel industry. The court directed ITC on remand to explain the significance of import volume or its relationship to other facts uncovered in the investigation. *USX*, 655 F. Supp. at 490-91. The limited discussion of market penetration presented here offers no such explanation. Instead, it is stated that, "[c]umulated imports accounted for less than 1 percent of apparent U.S. consumption during 1981, then increased to 1.4 percent in 1982 and 2.0 in 1983 [while] [i]mport penetration was 3.4 percent in January-September 1984 compared to 1.9 percent in the corresponding period of 1983." Remand Determination at 15. It is then concluded that, "[t]he cumulated import penetration of Argentina and Korea is very small and not consistent with a finding of unfair price discrimination." *Id.* This conclusory statement does not support a negative determination. It leaves unanswered the question of how the volume of imports relates to injury, particularly in the sense of the third statutory factor, impact on the

domestic industry. *USX v. US*, at 7-8. While the nominee's 2.5 percent market share presumption was apparently not directly before the court in the *USX* case, it seems likely that the decision's rejection of a "conclusory statement" that "import penetration is very small and not consistent with a finding of unfair price discrimination" would also presage rejection of the nominee's market share presumption, as insufficiently responsive to the factors upon which Congress directed the ITC to base its decisions.

In this regard, the committee notes that in the decision under review in *USX*, the nominee prefaced her discussion of the "import volume" or "market share" factor with the following sentence, which was not quoted in the Court of International Trade's opinion: "Examining import penetration data is relevant because unfair price discrimination has as its goal, and cannot take place in the absence of, market power." *Cold-Rolled Carbon Steel Plates and Sheets from Argentina*, Inv. No. 731-TA-169 (Final), ITC Pub. No. 1967 (March 1987), views of Chairman Liebler (on remand), at 15. This assertion appears strikingly inconsistent with the thrust of the *USX* opinion, in which the court criticized the nominee's apparent assumption that Congress did not intend to remedy material injury to U.S. industry when goods are imported "to sell at less than fair value even though there is no foreseeable potential for gaining an increased market share and raising prices." *USX*, at 15.

Another judge of the Court of International Trade recently relied on the *USX* decision in explicitly disapproving the nominee's market share presumption. In *Maverick Tube Corp. v. United States*, Court No. 87-04-00636, Judge Dominick L. DeCarlo, in a decision issued on May 24, 1988, remanded a decision of the International Trade Commission in which the nominee employed the market share presumption to support a negative preliminary determination on a petition claiming that domestic industry was materially injured by reason of imports of welded carbon steel line pipes and tubes from Canada at less than fair value. Judge DeCarlo's comments on the nominee's market share presumption, found at pages 5-6 of the slip opinion, are as follows:

To "give effect" to 19 U.S.C. § 1677(7)(C)(i), the Commission Chairman [the nominee] employed "a rebuttable presumption that an import penetration ratio, after cumulating imports as required, of less than 2.5 percent of apparent U.S. consumption is too small to be a cause of material injury and that any increase in the import penetration to less than 2.5 percent is too small to constitute a threat of material injury." USITC Pub. 1965, at 31-32. The Chairman stated that "[t]his presumption can be rebutted by showing that *both* domestic supply and demand for the product are inelastic." *Id.* at 32 (emphasis in original). A footnote refers to three determinations "[f]or a complete discussion of the rationale behind this 2.5 percent presumption." *Id.* at n.12. An examination of the determinations cited as support reveals that the "2.5 percent presumption" is based upon a predatory pricing analysis more akin to antitrust than antidumping. See, e.g., "Certain

Welded Carbon Steel Pipes and Tubes for the People's Republic of China," Inv. No. 731-TA-292 (Final), USITC Pub. 1885, at 17-28 (Aug. 1986) (Additional Views of Chairman Liebler); "Certain Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela," Inv. No. 701-TA-252 (Preliminary), USITC Pub. 1680, at 19-30 (Apr. 1985) (Separate Views of Vice Chairman Liebler). *See also* DeGrandis, "Proving Causation in Antidumping Cases," 20 Int'l L. 563, 586-88 (1986); Jameson, "Recent International Trade Commission Practice Regarding the Material Injury Standard: A Critique," 18 Law & Pol'y in Int'l Bus. 517, 548 (1986). This predatory pricing analysis was recently analyzed and rejected in *USX Corp. v. United States*, 12 CIT —, Slip Op. 88-30, at 5-17 (Mar. 15, 1988). Consistent with the holding in *USX Corp.*, the Court finds that predatory pricing analysis underlying the 2.5 percent presumption is not based on substantial evidence and is not in accordance with law.

The committee would make two further comments on this issue. First, the committee is troubled by what appears to be the nominee's cavalier attitude toward prior Commission decisions in this area. The nominee testified that in her view, "there is nothing in Commission precedent that would support [the market share presumption], not, I felt, preclude it either." (11/3 Tr., at 44.) The nominee acknowledged that, as Senator Heinz brought to her attention in 1985, the ITC had in the past made affirmative injury determinations in cases in which the import penetration levels were far below 2.5 percent. (*id.*) Indeed, according to Senator Heinz's letter, some of these cases involved import penetrations of as little as 0.5 percent, 0.6 percent, and 0.8 percent, in other words, one-third to one-fifth of the level below which the nominee presumes that imports cannot cause material injury. The nominee declined to comment on these cases, since they predated her tenure on the Commission. (11/3 Tr., at 44.)

The committee recognizes that the ITC, in making case-by-case determinations, is not subject to the principle of *stare decisis* in the same way as a court might be. Furthermore, the committee is not in a position to determine the correctness of the nominee's assertion that prior ITC decisions do not preclude the use of her market share presumption. But it is troubled by the fact that the nominee has evidently felt no need, either in her testimony before the committee or in those of her opinions which it has reviewed, either to distinguish these prior cases, or to state forthrightly that she believes them to be incorrect. This attitude may not augur well for the nominee's ability, if confirmed as a U.S. circuit judge, to treat precedent in a manner which provides clear and authoritative guidance to lawyers, litigants and citizens seeking to understand their rights and responsibilities under complex federal statutes.

Finally, the nominee's testimony (11/3 Tr., 43), that the market share presumption "is not a presumption of law[;] I use it as sort of an economic presumption" helps to focus the concerns expressed to the committee. The critics have asserted that as an ITC commissioner, the nominee has been guided more by economic ideology

than by fidelity to the law, as Congress has enacted it. Perhaps the market share presumption is good economics; this is a matter beyond the ken of this committee. But the critics—and the federal court charged with reviewing ITC decisions—make a persuasive case that it is not good law. That argument, of course, is directly relevant to this committee's consideration of whether the nominee should be confirmed as a U.S. circuit judge.

c. Cross-cumulation

The nominee's views, as expressed in her ITC decisions, on the rather technical issue of "cross-cumulation" have also been the source of controversy. This is the question of whether, in determining if dumped and subsidized imports have caused material injury to U.S. industries, the cumulative impact of dumped imports and subsidized imports should be considered. In several decisions, the nominee declined to "cross-cumulate" dumped and subsidized imports. This position was flatly rejected by the reviewing courts, which held that the statute requires cross-cumulation "without exception." *Bingham and Taylor v. United States*, 627 F. Supp. 793 (Ct. of Int'l Trade 1986), *aff'd*, 815 F.2d 1482 (Fed. Cir. 1987). Even after the Court of International Trade rendered its opinion on the cross-cumulation question, the nominee continued to decline to cross-cumulate in most cases. See Jameson, at 539.

These facts raised concerns about the nominee's willingness to apply precedent, even if she disagrees with it. The nominee was asked about this issue in written post-hearing questions. Her responses (see Ans. 22-28) significantly alleviate this concern. The nominee did cross-cumulate in the remand of the specific determination disapproved by the Court of International Trade in *Bingham & Taylor*. She did decline to cross-cumulate in other cases decided between the time of the CIT decision and its affirmance by the Court of Appeals for the Federal Circuit. Following a procedure which the nominee described as "not uncommon" and supported by the advice of Commission counsel, the nominee maintains that the Commission is not bound to apply a CIT ruling as precedent until it has been affirmed by the Court of Appeals for the Federal Circuit. Since the affirmance of the CIT decision in question, the nominee has cross-cumulated.

The committee notes that the nominee's views, or at least the result she reached on the cross-cumulation question, were in accordance with the positions contemporaneously taken by some of her fellow commissioners, both as to the merits of the issue, and as to whether the ITC should apply the CIT decision to other cases while it was on appeal.

With respect to the first issue—whether the statute requires the ITC to cross-cumulate—the nominee's interpretation was found by the CIT to be inconsistent with the statute. In this respect, the nominee's position is no different from that of any other judicial nominee who previously served as a judge or in a quasi-judicial capacity. Any judicial or quasi-judicial decisionmaker is sometimes found by a reviewing court to have misinterpreted or misapplied a statute. But in the case of cross-cumulation, as distinguished from the nominee's causation analysis, few knowledgeable observers have suggested to the committee that the nominee's misinterpreta-

tion of the statute stems from an inability or unwillingness to set aside her preconceived ideological views in favor of an objective inquiry into the intent of Congress in enacting the trade laws. These factors—the nominee's alleged lack of objectivity and open-mindedness, as reflected in the comments of many who have observed her performance as an ITC commissioner, and in the decisions she has rendered there—do not appear to the committee to be present in her views on cross-cumulation to the degree they appear to manifest themselves in her views on causation.

As to the second issue—whether the ITC should apply a decision of the CIT to other cases while it is on appeal to the Court of Appeals for the Federal Circuit—the committee cannot conclude that the nominee's views are inconsistent with established practices of the agency involved. Accordingly, while the nominee's cross-cumulation decisions may be controversial in some quarters, the committee does not perceive them as a significant factor in its consideration of her nomination.

d. Relief determinations

When the ITC finds that domestic industries are suffering serious injury as a result of fair competition from imports (so-called "escape clause cases"), the statute directs it to recommend to the President the relief that should be granted (*e.g.*, tariffs, import quotas, adjustment assistance to displaced employees, etc.). Two controversial aspects of the nominee's actions in escape clause cases were investigated by the committee.

First, in her 1983 hearing before the Finance Committee on her nomination to the ITC, the nominee responded as follows to a written question from Senator Heinz:

It is my understanding that it is the custom of most Commissioners not to participate in relief recommendations in those cases in which they have made a negative determination and their likely recommendation would be for no relief. This custom appears to be reasonable. (*Nominations of Seeley G. Lodwick, etc.*, S. Hrg. 98-212, at 76-77 (Senate Finance Committee, 98th Cong., 1st Sess.).)

In two escape clause cases heard by the ITC since the nominee joined the Commission, she dissented from the ITC's conclusion that domestic industries had been seriously injured by lawful imports. She went on to participate in the relief recommendation proceedings in those two cases. An issue has been raised as to whether the nominee's participation in the relief phase of these two escape clause cases is consistent with her testimony in 1983 before the Finance Committee.

The Judiciary Committee addressed written questions to the nominee on this topic. She responded as follows:

Of the eleven escape clause investigations conducted during my tenure on the Commission, the Commission found that increased imports caused or threatened serious injury in only four cases. I voted with the majority in two of these cases, *Unwrought Copper*, Inv. No. 201-TA-52, USITC Pub. No. 1549 (1984) and *Nonrubber Footwear*, Inv.

No. 201-TA-55, USITC Pub. No. 1717 (1985). In the remaining two cases, *Carbon and Certain Alloy Steel Products*, 201-TA-51, USITC Pub. No. 1553 (1984) and *Wood Shakes and Shingles*, Inv. No. 201-TA-56, USITC Pub. No. 1826 (1986), I found serious injury but did not find that increased imports were a substantial cause of the injury. I participated in the relief phase in these two cases as did other Commissioners who found that increased imports were not a "substantial cause" of serious injury.

I have, therefore, never faced the issue of whether I would participate in a remedy recommendation after finding that the domestic industry had not been seriously injured or threatened with serious injury.

As I stated in 1983, in response to a question from Senator Heinz, I believe that it is reasonable for a Commissioner to decline further participation in a case when that Commissioner has made a negative injury determination and is likely to recommend no relief. On the other hand, I believe it is also reasonable for Commissioners who make negative injury findings to participate in relief recommendations; the statute appears to contemplate their participation:

The *Commission* shall report to the President its findings * * * If the *Commission* finds * * * the serious injury or threat thereof described in subsection (b) of this section, it shall—

(19 U.S.C. § 2251(d)(1) (emphasis added).) (Ans. 12-13.)

It appears that the nominee's actions in participating in the relief phase of escape clause cases is not literally inconsistent with her testimony before the Finance Committee in 1983, for two reasons. First, at that time, the nominee did not specifically pledge to refrain from participation in the relief phase if she made a negative injury determination; she merely stated that such a practice was "reasonable," an observation which she has now supplemented with the comment that the opposite course of action would also be reasonable. Second, the nominee points out that the relief phase is reached only if the ITC makes two separate determinations: that a domestic industry has been seriously injured, and that increased imports are a substantial cause of this injury. While, in the two cases in question, she concluded that the ITC should deny the petitions without proceeding to the relief phase, in which she later participated, she based this conclusion on the lack of causation, not on the lack of injury.

The second concern that has been raised about the nominee's actions in escape clause cases goes to the content of her relief recommendations, as well as comments she is alleged to have made in the course of considering relief. Three instances have been brought to the attention of the committee.

First, in the case of *Carbon and Certain Alloy Steel Products*, a massive escape clause petition filed by the steel industry, the nominee recommended that no relief be granted. She further recommended that if the ITC recommended any relief, and the President followed this recommendation, the President should "condition such

relief on a 20 percent compensation cut by steelworkers." She argued that such a cut "would result in a huge social welfare gain," and further stated:

I carefully considered other possible conditions, including concessions by management, guarantees of specific new investment by the industry, and the linking of import relief to productivity gains. In my view, each of these conditions could be counterproductive and cause serious injury to the steel industry. Therefore, I have not made any gesture of even-handedness by including such conditions in my proposal. (*Carbon and Certain Alloy Steel Products*, 201-TA-51, USITC Pub. No. 1553 (1984), at 14 (ITC Transcript of 7/11/84).)

In response to written questions from the committee, the nominee explained her decision in this case. (See Ans. 13-16.) In particular, she explained her conclusion that pay cuts for steel industry management would "cause serious injury to the steel industry," while pay cuts for steel workers should be a necessary precondition for import relief, as follows:

There was no information in the record suggesting that steel executives were being paid more than their opportunity costs (i.e., what they could earn at other jobs). Thus, pay cuts for steel executives could result in these executives quitting their jobs, thereby leaving the industry without competent management.

There was, however, considerable evidence in the record suggesting that pay cuts to hourly workers would not result in depriving the industry of trained employees * * *. (*Id.* at 15.)

The second issue involves both the steel case, and a separate escape clause petition brought by the nonrubber footwear industry. In both cases, the argument was raised that import relief would make these industries more attractive to investors, who could provide the capital needed to modernize production. In the shoe case, the nominee wrote that this argument "reflects a fundamental misunderstanding of the way in which capital markets operate." In the steel case, she stated that "new investment, if it is sound, will take place with or without the erection of additional import barriers."

In response to a written question from the committee, the nominee amplified these statements with the following observation:

I do not think it is appropriate for a Commissioner to encourage or discourage any particular investment or to condition import relief on the reinvestment of additional cash flow in the industry. These decisions should be made by managers, stockholders, bondholders, and other creditors of the firm, not the government. (Ans., at 17.)

Finally, the nominee was asked at the August 6 hearing about the following report that appeared in a 1985 newspaper story on a public hearing held in connection with the shoe industry escape clause petition:

"I don't understand. Why don't you move somewhere else to get a job?" asked Susan Liebeler, one of five members of the International Trade Commission currently reviewing the problems of the U.S. shoe industry.

"That's what I did," continued the commissioner during the ITC's second day of hearings. Liebeler, reportedly a close friend of the Reagans, is managing a two-coast marriage since last April when she accepted her current \$70,000 per year White House appointment to the Commission.

(BANGOR DAILY NEWS, APRIL —, 1985)

The nominee testified that she had addressed the quoted remark to an economist testifying on behalf of the shoe workers, and not to displaced shoe workers themselves. She also asserted that the article printed the quotation out of context, and that she did not intend to compare her job as a tenured law professor with that of a displaced shoe worker. (8/6 Tr., at 86-89.)

In the Committee's view, the issues presented by the nominee's remarks and decisions in the escape clause cases are somewhat distinct from the issues previously discussed.

Ms. Liebeler's supporters have frequently emphasized that the statutes which the ITC is called upon to apply accord that agency considerable discretion and room for interpretation. The committee does not find that argument particularly persuasive in the case of the nominee's causation analysis in dumping and CVD cases. The essence of the criticism which the committee has considered in that field is not that an ITC Commissioner lacks discretion in interpreting the statute, but rather that the nominee's record at the ITC demonstrates that she has abused her discretion in a manner that particularly undermines confidence in her ability to serve as a fair, open-minded and objective judge, guided by the expressed will of Congress rather than by her own ideological predilections.

In escape clause cases, by contrast, and particularly in the relief phase of such cases, that argument carries more force. In the relief phase of escape clause cases, the ITC is interpreting and applying a statute, but it is doing so in the capacity of an advisor to the President, more than in a quasi-judicial capacity. This distinction explains, for example, why ITC determinations in dumping and CVD cases are reviewable by the federal courts, while its recommendations in escape clause cases are unreviewable, except by the President.

The testimony and submissions summarized in this section are nonetheless relevant to the nominee's qualifications for this nomination. Her decisions in the steel and shoe industry escape clause petitions do shed some light on the predominance in her thinking of economic models and analysis, to the complete or partial exclusion of other factors. The committee has also considered the nominee's apparently self-contradictory views that import relief may properly be conditioned upon some changes in industry practices (e.g., employee compensation), but not upon others (e.g., investment practices). Finally, a comparison of the nominee's 1983 testimony on participation in the relief phase of escape clause cases with her

subsequent actions in such cases may be relevant to evaluating her candor in the confirmation process, surely an important consideration in this or any other nomination.

B. CONCERNS ABOUT THE NOMINEE'S TEMPERAMENT, JUDGMENT, AND CANDOR, AS REFLECTED IN HER INVOLVEMENT IN CERTAIN INCIDENTS

The committee conducted an extensive investigation into certain incidents in which the nominee was involved. These incidents raise questions about the nominee's judicial temperament and sense of judgment. Her response to the committee's questions on one incident, in particular, also raise questions about her candor. While numerous incidents were investigated, two in particular merit extended discussion in this report: the 1973 prosecution of the nominee on extortion charges, and her role in a 1986 management study at the ITC.

1. THE 1973 PROSECUTION

The following summary of the factual background of the nominee's 1973 arrest on extortion charges is drawn from the testimony and other materials available to the committee.

For some years, the nominee and her husband have maintained a residence on a farm in Newfane, Vermont. Her husband has also owned an eight-unit rental property in the village of Newfane since the early 1970s.

In 1973, the nominee and her husband became involved in a landlord-tenant dispute with one of the tenants of the Newfane rental property. The tenant, Matthew Klein, was at least one month in arrears on his rent. On July 30, 1973, the nominee and her husband went to Mr. Klein's apartment when the tenant was not there. Mr. Liebelier unlocked the door with his key, and either alone or with the nominee's assistance removed the tenants' belongings. The nominee's husband then changed the lock on the door and nailed the windows shut. The nominee and her husband transported the tenant's belongings to their farm, and later placed them in storage in Brattleboro, Vermont. Later that day, the nominee and her husband returned to the Klein apartment, where Mr. Liebelier began to remove the door. Mr. Klein was on the scene at this time, and he and the nominee's husband engaged in a scuffle in which the tenant suffered minor injuries.

Upon the complaint of the tenant, the Vermont State Police investigated the incident. The complainant, the Liebelers, and other witnesses were interviewed and statements were taken. A search warrant was obtained and executed at the Liebelers' farm residence, and various items claimed to belong to the tenant were seized. Ultimately, informations and arrest warrants were issued by the District Court in Windham County, Vermont against both the nominee and her husband. The information laid against the nominee charged her with two extortion offenses. The first count charged the nominee as an accessory before the fact for allegedly "counsel [ing] [her husband] to commit the offense of extortion * * * by counselling [him] to enter premises occupied by Matthew Klein and take property belonging to Klein to force Klein to pay money to [Mr. Liebelier]." The second count charged the nominee

with aiding and assisting in the commission of extortion by "gathering personal property belonging to * * * Klein * * * which were removed for the purpose of extorting money from" the tenant. Mr. Liebelier was charged with three counts: breaking and entering with intent to commit extortion; extortion; and assault.

The Liebeliers obtained counsel and moved the court to dismiss the prosecution. After a hearing and submission of memoranda, that motion was denied, and the cases were set for trial. Subsequently, the information against the nominee was *nol prossed* by the District Attorney upon the *nolo contendere* plea of her husband to simply assault.

In the course of its investigation of this incident, the committee obtained the relevant records from the District Court in Brattleboro, Vermont, as well as the report of the Vermont State Police officers who investigated the case and executed the search warrants. The prosecuting attorney was also interviewed, and he submitted two letters for the record. The nominee submitted a brief statement about this matter in response to the committee's confidential questionnaire. She was also examined extensively on this incident at the hearing on August 6, 1987. She also submitted a further statement on this incident as part of her post-hearing submission. The committee asked the FBI to attempt to locate Matthew Klein so that he could be interviewed. He could not be located.

The committee recognizes that in the ultimate disposition of this case, the charges against the nominee were dropped by the Vermont prosecutor. Its purpose in delving into this incident has not been to try the facts, nor to determine the law, nor to reach any conclusion about the nominee's guilt or innocence. Its concern has been to determine what light, if any, this incident may shed upon the nominee's good judgment, temperament and suitability for judicial office. In the course of its investigation, the committee found that there are substantial discrepancies between the nominee's description of the events in question and other evidence in the record, including both the contemporaneous court records and police reports, and the recollection of the prosecuting attorney. These discrepancies raise questions about the nominee's candor or at least the accuracy of her recollection about this unfortunate incident. These discrepancies fall into three principal categories: the nominee's assertion that the charges lacked any basis in law or fact; her role in advising her husband of the legality of resort to self-help in resolving this landlord-tenant dispute; and her characterization of the role of the prosecuting attorney.

a. Basis in law or fact

In her post-hearing submission to the committee, the nominee stated: "I have always believed that there was no basis in law or fact for the criminal charges against me." (Sub., at 34.) Because the nominee made an almost identical assertion in her confidential questionnaire response, the committee examined her in some detail on this issue at the August 6 hearing.

As far as the basis in fact for the charges, the nominee conceded that most of the factual allegations in the police report and court records as the basis for the information laid against her were sub-

stantially accurate, to the extent that she could recollect them. She testified, for example, that she accompanied her husband to the Klein apartment on July 30, 1973, and that the tenant's belongings were removed and taken to the Liebelers' Newfane farm, and later transferred to a commercial storage facility. (See 8/6 Tr., at 20-22.) She does dispute the factual allegations about her role in counseling her husband on the legality of these actions.

As far as a basis in law for the charges, the nominee is of course entitled to her opinion. But as she conceded at the hearing, a motion to dismiss the charges was presented to the court, which denied it. The court records available to the committee do not indicate the precise ground on which the nominee's lawyer sought to have the charges against her dismissed, although the records do clearly indicate that the motion to dismiss the charges against her husband was based on an argument of legal insufficiency. Ultimately, the charges against the nominee, which were initiated by information issued by the Vermont District Court, were dismissed, not based upon any finding by that court that they lacked a legal basis, but upon the motion of the prosecuting attorney in the exercise of his discretion.

b. The nominee's role in counseling her husband

The record reveals serious discrepancies on the question of whether the nominee advised her husband that he was entitled to resort to self-help, rather than to eviction procedures available by statute, in terminating Mr. Klein's tenancy.

The nominee described the legal theory under which her husband concluded that he was entitled to resort to self-help as follows: "My recollection is that the provision in the lease incorporated the rights of innkeepers under the Vermont innkeeper's statute, cross-referenced it, and went on to state that the landlord would have those rights in the event of arrearages over a particular period of time." (8/6 Tr., at 25-26.) This testimony is consistent with other statements by the nominee in the record as to the basis for the legality of self-help. (See *id.*, at 25.)

The Vermont statute in question does authorize innkeepers to enter rented premises and remove the belongings on nonpaying tenants. But, by its terms, the statute applies only to premises rented by the day or by the week. (See 13 VT. Stat. Ann. 2561.) The nominee testified that the tenant in this case has a one-year lease. (8/6 Tr., at 17.) Apparently the basis for the claim of legality of the landlord's actions in this case turned on the specific terms of the lease.

The lease is not in the record before this committee. The nominee testified that she had no copy of the lease. (*Id.*) Nor does a copy of the lease appear in the court records obtained by the committee.

The nominee's testimony about her knowledge of the terms of the lease was self-contradictory. She testified that she was "quite sure that there was a written lease," but that "I've never—I don't think I ever—I don't remember, Senator, if I've seen the lease or not * * *" (*Id.*) Later in the hearing, she testified in some detail as to the purported terms of the lease. (*Id.* at 25-26.)

The record is similarly unclear as to the nominee's role in advising her husband of his rights under the lease. At the time in ques-

tion, the nominee was a recently admitted member of the Vermont bar, but she was not engaged in the practice of law in Vermont in 1973. At the hearing, the nominee testified that "I wasn't functioning as a lawyer in this transaction at all. My husband did the research on the legality of the lease provisions * * *. We discussed the validity of the lease provision extensively, and [Mr. Liebeler] had done the research and it was his belief that it was a valid contractual right of entry, and I also believed that it was valid." (*Id.* at 23. See also *id.* at 26) (Mr. Liebeler "had done the research. He was a lawyer. He decided that the lien was valid and I had no reason to suggest to him that it was otherwise.")

The contemporaneous police records tell a different story. A Vermont State trooper filed a report on this incident on August 3, 1973, a few days after the incident. The report includes the trooper's summary of statements taken from the nominee and her husband. The summary of the nominee's statement reads as follows:

Susan Wittenberg Liebeler told this Officer that both she and her husband were Attorneys; that "Jim" taught law at UCLA and although he was not a member of the bar in Vermont, she had served her clerking time with John Burgess in Brattleboro. She further stated that she had done the research on the Hotel lien and had advised her husband of the law to which this lien pertains.

On August 2, 1973, a second State trooper executed the search warrant for Mr. Klein's belongings at the Liebelers' Newfane residence. The officer's report includes the following statement: "The warrant was read to Mr. Liebeler, and he questioned validity of the warrant. This officer gave Mrs. Liebeler a copy, as she was acting as her husband's attorney. She * * * advised it appeared in order and officers could search."

At the hearing on August 6, the following exchange occurred:

Senator LEAHY. The police said that you had told them that you had researched the law.

Ms. LIEBELER. That's not my recollections, Senator. (8/6 Tr. at 24.)

Finally, the committee has considered the letter of December 2, 1987, from M. Jerome Diamond, Esq., of Montpelier, Vermont, to Senator Leahy. Mr. Diamond was the State's attorney for Windham County in 1973, and prosecuted the case against the nominee and her husband. While his letter will be discussed in more detail in the following section, the following passage is relevant to the issue under discussion here:

[The nominee] indicates [in her hearing testimony] over and over that she had not researched the law and was not really acting in her capacity as a Vermont lawyer. Her representations to me were exactly to the contrary. She told me that she was an admitted attorney in Vermont, had researched the law, and was certain the provisions under which she and her husband had exercised self-help to resolve their landlord-tenant dispute were valid and enforceable.

c. The role of the prosecuting attorney

In her testimony and submissions with regard to this incident, the nominee has consistently maintained that Mr. Diamond, the State's attorney who prosecuted her, was also representing the tenant. The following excerpt from her post-hearing submission summarizes her recollection of Mr. Diamond's role:

I spoke with the tenant and asked him to either pay rent or leave the building. The tenant told me that he had been to see Jerome Diamond, a lawyer in Brattleboro, Vermont and that Mr. Diamond had told him that he had the right to stay in the apartment rent-free for several months while the landlord tried to evict him through court proceedings.

Because I believed that Mr. Diamond was representing the tenant, I went to his office in Brattleboro to see if I could help my husband work this matter out. I spoke to Mr. Diamond and offered to forgive the back rent and pay some or all of the tenant's moving expenses if the tenant would vacate the premises. Mr. Diamond told me that this was not acceptable and that in his view the tenant was entitled to remain in the apartment and not pay rent while my husband went to court to try to evict him. I called Mr. Diamond's attention to the provision in the lease giving the landlord the right to enter the premises and remove the tenant's possessions in the event of non-payment of rent. Mr. Diamond told me that that in his view such provisions were invalid, but he was unable to cite any precedent to support this position. (Sub., at 32. *See also* 8/6 Tr. at 30-35.)

Mr. Diamond, in his December 2 letter to Senator Leahy, vigorously disputes this allegation:

First, you should understand that she never talked to me before the occurrences which led to her being charged. Mr. Klein never came to the State's Attorneys office until he was confronted with the situation of his belongings having been removed and the locks changed on his door. Ms. Liebeler's statement that she talked to me before the seizure of his belongings is ridiculous. Mr. Klein came to me when his options were a civil lawsuit to reclaim his belongings for which he had already consulted a private attorney, or the criminal justice process. I knew that if there was a basis for criminal jurisdiction, a search warrant issued in conjunction with charges could accomplish much faster what an injunctive action on the civil side could. At no time was Mr. Klein represented by me. He was a complaining witness that the state used to support its criminal charges against Mr. and Mrs. Liebeler.

Mr. Diamond's letter also states that "Ms. Liebeler's discussion with me and offer to pay for Mr. Klein's storage and moving expenses were after the fact."

The committee has reviewed the court and police records on this matter with an eye toward resolving the nominee's allegation that

the prosecution of her was tainted by the prosecutor's conflict of interest. Nothing in these records indicates or even suggests that Mr. Diamond represented the tenant, Mr. Klein, at any point in the proceedings. These records are fully consistent with Mr. Diamond's assertion that his only professional relationship with Mr. Klein was that of prosecutor to complaining witness. The only indication in these records that Mr. Klein sought legal counsel of any sort prior to July 30, 1973, is a statement contained in an affidavit he executed on August 1, and which was attached to the application for a search warrant for the Liebelers' farm residence, in which he claims to have talked on July 24 with John Burgess, another lawyer in Brattleboro who Klein asserts "had handled Mr. Liebeler's business affairs related to the building in which my apartment is located." Attached to this affidavit is a copy of a letter from Mr. Klein to Mr. Liebeler dated June 8, 1973, on which it is indicated that a copy was sent to Mr. Burgess. Nothing in these records supports the nominee's assertion in her post-hearing submission that "the tenant told me that he had been to see Jerome Diamond." As noted above, the committee staff sought to interview Mr. Klein, but he could not be located.

In summary, the committee's extensive investigation of the prosecution of the nominee on extortion charges did not enable it to draw definitive conclusions. However, the facts of this incident raise questions about the nominee's temperament and good judgment. Of course, this incident occurred some 14 years ago, a fact which the committee has taken into account. But the committee finds it significant that the nominee's current testimony concerning this incident has been contradicted in several material respects by both the contemporaneous record and the current recollection of other participants in the prosecution. Under these circumstances, the committee concludes that the 1973 prosecution of the nominee remains relevant to a consideration of her fitness to serve as a federal judge.

2. THE MDS CONSULTING CONTRACT

The nominee became a member of the International Trade Commission in 1984. Two years later, in June of 1986, she assumed the office of Chairman of the ITC. One of her first official acts in that position was to commission a management consulting study of ITC operations by a firm called MDS, Inc. In its interviews with the nominee's fellow ITC Commissioners, ITC senior staff, and other persons knowledgeable about her performance at the ITC, the committee frequently encountered criticism of her actions with respect to the MDS study. Accordingly, the committee conducted a detailed investigation of this matter, and questioned the nominee extensively concerning it at the hearing on August 6, 1987. The record before the committee raises substantial questions about the nominee's exercise of good judgment with regard to this study.

The individual who was principally involved in conducting the study which the nominee commissioned was Alan Seissler. The nominee met Mr. Seissler in 1982, when she was house-hunting in the Washington, D.C., area, in anticipation of her confirmation to the ITC. Mr. Seissler was referred to the nominee by her real

estate broker, for the purpose of placing a mortgage loan for the nominee. Because of the delay in the nominee's confirmation for the ITC position, this transaction was never consummated. However, when Ms. Liebeler was confirmed as an ITC Commissioner in 1984, and relocated to the Washington area, she once again contacted Mr. Seissler, who arranged mortgage financing for her.

In the course of these initial business dealings between the nominee and Mr. Seissler, he made various representations to her about his professional qualifications. In a narrative overview of the MDS contract which the nominee provided to the committee, and which has been included in the record of the August 6 hearing, the nominee summarized these representations as follows:

In the course of our representations, he represented that he was a certified public accountant, and that he held an MBA from Harvard and a Ph.D. in computer science. ("Overview of Events Related to MDS" (hereafter "Overview"), at 1.) The nominee testified on August 6, 1987, that these representations were made to her as early as 1982, and that she does not remember whether she ever asked from what institution Seissler had received a Ph.D. degree. (8/6 Tr., at 40-41.)

Mr. Seissler next contacted the nominee a few months later, in the spring or summer of 1985. The nominee had lunch with him and "talked extensively about office automation at the ITC." (Overview, at 2.) Later, the nominee arranged for Mr. Seissler to have lunch with her and one of her fellow Commissioners in February 1986. At this luncheon, "computers and automation at the ITC" were discussed. (*Id.*) There was also apparently some discussion of Mr. Seissler's qualifications, although he was not asked to furnish a résumé. Mr. Seissler represented that he was then "a principal in, and an employee of, American Management Services ("AMS"). (*Id.*) He referred the two commissioners to two studies performed by AMS for two federal agencies. The nominee states that she and her fellow Commissioner checked with officials at the two federal agencies involved, and received favorable reports on the work done by AMS, although it does not appear that they inquired specifically into Mr. Seissler's role, if any, in these studies. (*Id.*)

In May 1986, the nominee met two more times with Mr. Seissler. Seissler told her (and the Vice Chairman of the ITC, who was also present) that he had left AMS and was now associated with one Marshall Sokol (who also attended these meetings) in a firm called MDS. Seissler repeated the representations he had previously made about his education and experience. Once again, it does not appear that the nominee asked him for his resume, or even for the name of the institution from which he claimed to have obtained a Ph.D. (*Id.*, at 3; 8/6 Tr. at 44-45.) The nominee met once or twice more with Messrs. Seissler and Sokol before she assumed the chairmanship in June 1986. (Overview, at 4.) It does not appear that on any of the five or six occasions on which the nominee met with Seissler during the 2 years she served as an ITC Commissioner, before assuming the chairmanship, the nominee made any effort to verify Seissler's claims about his professional background, nor did she ask him for his résumé.

The nominee became Chairman of the ITC on June 16, 1986. The next morning, she called the ITC's Director of Administration to her office and directed him to prepare the paperwork for a consulting contract with MDS in the amount of \$24,750. She was advised by the Director of Administration that "the Commission could contract for up to \$25,000 without going through competitive bidding." (*Id.*, at 5.) The Director of Administration advised the nominee, and also Mr. Seissler, who was present, that a "capability statement" was required in order to complete the paperwork. While the nominee referred to the capability statement as "some magic procurement language," (8/6 Tr. at 56), the committee's understanding is that the capability statement was needed to document the contractor's ability to perform the contract.

Mr. Seissler furnished a capability statement, which reads in its entirety as follows:

Since 1972, MDS consultants has specialized in strategic planning, management audits and controls, and financial management systems for major domestic and international financial institutions, "Fortune" sizes companies, and government agencies. The firm and its principals have published numerous professional articles, monographs, and books, and serve as faculty of universities and professional symposiums. (8/6 Tr., at 59.)

It appears that the nominee made no effort to verify any of these assertions, by, for example, asking Mr. Seissler to identify the corporations or financial institutions for which he (or other principals in MDS) had consulted or the universities where he (or other principals in MDS) claimed to have taught. She told the committee that she "did not rely on the capability statement in deciding that these people were qualified to do the work." (*Id.*)

The stated purpose of the contract was "to provide advice on management responsibilities relevant to [the nominee's] responsibilities under the [Federal Manager's Financial] Integrity Act." (Overview, at 5.) In fact, this contract seems to have been conceived from the outset as a wide-ranging management study. Prior to entering into the contract, the nominee shared with Messrs. Seissler and Sokol her views on a wide range of management matters, including management structure and the need for an executive directors position, which did not at the time exist at the ITC. (8/6 Tr., at 49-50.)

Pursuant to the purchase order creating the contract between the ITC and MDS, Seissler submitted a written progress report on June 24, 1987, and the nominee approved payment of the first installment under the contract. As work on the contract progressed, the nominee "became concerned about the Commission's budget process and had several conversations with Mr. Seissler about my need for assistance in this area." (Overview, at 5.) In late July, the nominee directed the ITC to enter into a second contract with MDS for consulting on budget matters. This was done on July 29, 1986. (*Id.*, at 6.) The nominee still made no effort to verify Mr. Seissler's credentials before entering into the second contract. (8/6 Tr. at 63-64.)

By this time, the nominee had received Seissler's draft report under the first contract. In her narrative, she stated that "while the conclusions of the report seemed sound, the report failed to describe adequately the evidence supporting these conclusions." (Overview, at 5.) A week later, MDS delivered the final report. The nominee immediately took the following actions.

First, she accepted the report, and approved the final payment under the first contract. She did so even though, as she stated in her narrative, "I still did not believe that the written report provided adequate substantiation for many of its conclusions. In addition, the final report was not well written. I did not feel, however, that these concerns justified not accepting the final report * * *" (*Id.*, at 6.)

Second, the nominee had copies of the report hand-delivered to the congressional committees with oversight authority over the ITC, along with a cover letter stating:

The primary finding of the study is that the Commission generally does not operate in accordance with the Federal Managers Financial Integrity Act (FMFIA) * * *. I believe that the management problems can be remedied if appropriate action is taken and the issue remains non-partisan. (Letter of Susan Liebler to Rufus Yerxa, August 1, 1986.)

Third, the nominee circulated copies of the final report to her fellow commissioners. (The nominee had not consulted with three of her five fellow Commissioners prior to commissioning the study, (8/6 Tr. at 48.) Two of these three Commissioners had previously served as Chairman of the ITC. A fourth fellow Commissioner had met Mr. Seissler previously, but the nominee has stated that this Commissioner also was not consulted about the MDS contract prior to June 17, 1986, when the contract was signed. (Letter of Susan Liebler to Rufus Yerxa, October 7, 1986, at 7.))

Within hours, four of the nominee's five fellow Commissioners responded to the report. In a letter to the nominee dated August 1, 1986, they noted that the report contained "far-reaching proposals" to reorganize the Commission's staff and make other changes. They "insist[ed] that any effort to implement *any* of the report's recommendations be suspended until the Commission has had full opportunity to review these recommendations and talk with the authors." These four Commissioners also noted "that the report is unsigned—containing no information about the consulting experience of the firm selected to provide these recommendations and no data about the authors." (Letter of Commissioners Paula Stern, Alfred Eckes, Seeley Lodwick, and David Rohr to Chairman Liebler, August 1, 1986.)

The nominee responded promptly to this letter by attempting to arrange a meeting among her fellow Commissioners and Messrs. Seissler and Sokol. The MDS principals were uncooperative in these efforts, although they did meet with the nominee at least twice during the week of August 11, 1986. Finally, a meeting with five of the six Commissioners (including three of the four signers of the August 1 letter) took place on August 15, 1986. Sometime prior to this meeting, in response to her fellow Commissioners' letter of

August 1, the nominee asked Mr. Seissler to provide an "educational vitae" or resume. (8/6 Tr., at 65.)

At this point—early or mid-August, 1986—the nominee had known Mr. Seissler for 4 years. She had been actively discussing ITC management problems with him for nearly a year. She had considered the possibility of retaining him to perform consulting services at least 6 months before. She had entered into two consulting contracts with his firm, each of which required documentation of the firm's capabilities to perform the contract. She had approved the final report submitted under one of the contracts, and had authorized full payment to MDS for Mr. Seissler's work. At this point, evidently for the very first time, the nominee asked Mr. Seissler to state in writing the educational background which he claimed to possess.

Seissler was slow to respond to this request. Finally, on August 20, 1986, he dictated to an ITC secretary his curriculum vitae. This document was entered into the record of the hearing on August 6, 1987. The "education" portion of this document reads as follows:

Education

BS, Major in Accounting—Fordham University, New York, NY, cum laude. Honorary Diploma of Distinction, Art and Literature—Royal Academy, Antwerp, Belgium. Diploma of Completion, Major in Mathematics, Heidelberg University, Heidelberg, Germany. MBA, Harvard University. PhD, The University Consortium of Washington.

The nominee testified that the resume dictated by Mr. Seissler "was consistent with the information he had given me before about his degrees and education." (8/6 Tr., at 67.) The nominee's narrative overview states that when she talked with Mr. Seissler later that day, August 20, she

asked Mr. Seissler why there were no dates disclosed for his graduate degrees. Mr. Seissler gave me some dates but the tone of his voice made me suspicious that he did not have the degrees he claimed. I asked if he really had those degrees. First he assured me that he did; then after more questioning, Mr. Seissler told me that neither he nor Mr. Sokol had Ph. D. degrees. (Overview, at 7.)

Later that day, Mr. Seissler also admitted that he had deliberately refused to return to a senior ITC staffer certain documents which had been furnished to him for use in the management study. (*Id.*, at 8.) The nominee also relates that at this time, Seissler made a statement which indicated that he might physically harm another ITC commissioner. (*Id.*; 8/6 Tr., at 68-69.)

By the next day, the nominee had acted to terminate the Commission's dealings with Mr. Seissler and MDS. She ordered that the second contract with MDS (on which no work had been performed) be cancelled. She took steps to suspend the final payment on the first contract. And she asked the Criminal Division of the Justice Department to investigate the situation for possible fraud against the government. (Overview, at 8-9.) Ultimately, the Justice Department closed the criminal investigation without initiating a prosecu-

tion, and consequently the final payment to MDS under the first contract was released.

The conclusion of the MDS report, and the nominee's role in commissioning the study, continued to excite controversy at the ITC. For the purposes of this committee's consideration of this matter, the most important sequel occurred on October 1, 1986. On that date, the nominee sent a memorandum to two of her fellow Commissioners, Paula Stern and Alfred Eckes. Both of these Commissioners had previously served as ITC Chairmen. The memorandum read as follows:

U.S. INTERNATIONAL TRADE COMMISSION,
Washington, DC.

MEMORANDUM

To: Commissioner Stern.
From: Chairman Liebeler.
Date: October 1, 1986.
Re: MDS.

The MDS Consultants, Inc. study of July 30, 1986, states on page nine, "Since the Commission has no regular audit program, has not complied with OMB A-127 requirements, the provisions of A-123, we question the completeness of the Chairman's annual FMFIA certification to the President and the Congress.

The MDS report does not substantiate this statement and provides no basis for such an assertion. I have no reason to question the good faith and integrity of you or Commissioner Eckes in your roles as Chairman in providing certifications under the Federal Managers Financial Integrity Act.

Please feel free to share this memorandum with such persons as you believe appropriate.

Senator Leahy asked the nominee about this memorandum at the hearing on August 6, 1987. He pointed out that immediately upon receiving the MDS final report, which contains the language quoted in the memorandum, the nominee had dispatched it to the ITC's congressional oversight committees, with the cover letter previously quoted. The October 1 memorandum states that the report "provides no basis for [the] assertion" that the FMFIA certification made by previous Chairmen of the Commission were incomplete or improper.

The nominee provided the following explanation for this discrepancy:

The memorandum on October 1, 1986, was given to Commissioner Stern and Commissioner Eckes in response to Commissioner Stern's perception that somehow her integrity had been called into question by the MDS report.

I did not ever feel that the integrity of Commissioner Eckes or Commissioner Stern had been called into question by the MDS report. And given the depth of Commissioner Stern's feelings on this issue, I acceded to her request to provide this memorandum to her, but I see nothing in the MDS report that would question the good faith

or the integrity of any Chairman of the ITC. (8/6 Tr., at 77.)

The committee has examined the circumstances surrounding the MDS report in some detail in order to see what light this incident sheds upon the nominee's fitness for the federal bench. The committee is not concerned with the specific recommendations contained in the MDS report. These were, and apparently continue to be, the subject of considerable controversy among some Commissioners and senior staff members of the ITC. The committee's focus, however, is what this incident shows about the nominee's good judgment, her collegial skills and her balancing of a substantive agenda with the means for carrying out that agenda.

With respect to judgment, the committee is troubled by the nominee's failure to scrutinize the apparently false or misleading representations made to her over a long period of time by Alan Seissler. The committee is well aware of the fact that, as Senator Leahy put it at the August 6 hearing, "hindsight is 20-20 always." (8/6 Tr., at 71.) The nominee testified that "even with hindsight, I had no suspicion whatever." (*Id.*) Clearly, the nominee is sincere in her assertion that she subjectively felt no need to seek to verify Seissler's repeated representations concerning his educational background. Nevertheless, the facts surrounding this incident amount to a record of credulity that cannot help but reflect poorly upon the nominee's capacity for objectivity and good judgment.

In this regard, it is significant that the nominee's fellow Commissioners, once they became aware of the work product of the MDS study, almost instantaneously sought to learn the qualifications of the author of the study. Of course, this may have been due in great part to the fact that at least some of these Commissioners were less enthusiastic about the study's recommendations than the nominee appeared to be in early August of 1986. Their reservations about the recommendations on policy grounds may have heightened their skepticism. But conversely, the nominee's agreement with many of the conclusions reached by MDS may have increased her willingness to accept Seissler's claims at face value.

Even an appellate judge, who is not ordinarily called upon to judge the credibility of witnesses, must demonstrate objectivity and a sense of good judgment. The record of the nominee's performance with respect to the MDS contract gives rise to substantial questions on this score.

Second, the nominee's actions in forging ahead with the MDS contract while soliciting the input of only one of her fellow Commissioners is illustrative of the continual internecine strife which has marked her tenure as Chairman of the International Trade Commission. The committee has been advised that this lack of collegiality is not a new phenomenon at this agency. But some of the Commissioners and senior ITC staff interviewed in connection with this nomination seem to believe that disputes among Commissioners, and conflicts involving senior staff, have reached unprecedented levels of intensity during the nominee's tenure. There may be many reasons for this: policy disagreements, differing management styles, hidden agendas of various kinds. But whatever the causes, the MDS incident illustrates the costs incurred when the chairman

of a collegial body succumbs to the centrifugal forces and elects to "go it alone." Closer cooperation among the Commissioners could have spared the agency, and the nominee herself, considerable embarrassment, and would have advanced the nominee's laudable aim of improving the efficiency and accountability of the Commission's operations.

The committee recognizes that there are significant differences between the ITC and the Court of Appeals for the Federal Circuit with respect to the need for collegiality. Individual judges act with autonomy in particular cases, and the administrative conflicts that may arise in the management of a large professional and nonprofessional staff are less likely to interfere with the operations of the court with its smaller bureaucracy. But judges still must work together, whether in three-judge panels on particular cases, in en banc proceedings or on housekeeping matters. The demands of collegiality are different on a court than they are in a quasi-judicial agency, but they are real, and not every lawyer, no matter how bright or hard-working, is capable of fulfilling them with equal success. The MDS incident is indicative of reason to question the capacities of this nominee on that score.

Finally, it has been strenuously argued to the committee that the MDS contract illustrates the nominee's intensive focus on policy ends, to the exclusion of consideration of the legitimate means of achieving them. This issue is, of course, also presented by the record of the decisions the nominee has rendered in cases before the ITC, as discussed earlier in this report, and the committee's consideration of this argument is necessarily influenced by its evaluation of those decisions.

In the case of the MDS contract, the nominee was asked at the August 6 hearing to address the allegation that she "had an agenda of management changes [she] wanted to accomplish at the ITC, [that she] viewed the MDS study as a means to those ends, [and that] consequently [she] neglected to consider adequately whether those means were appropriate." (8/6 Tr., at 72.) She denied this allegation, and specifically denied that she dictated the study's conclusions or gave MDS a "hit list" of career personnel whose jobs should be targeted for restructuring. (See 8/6 Tr. at 48-53, 73-75, 80-82, in which the nominee discusses at some length the concerns about management problems which she discussed with the consultants.)

While the committee credits this testimony, the fact remains that the nominee's actions in commissioning, and then apparently immediately embracing the conclusions of, the MDS study, led many of her colleagues and subordinates to conclude that her devotion to a management agenda had overpowered any commitment she may have had to a collegial and constructive process for improving the operations of the ITC. Indeed, one of her fellow Commissioners apparently perceived the nominee's actions as calling into question that Commissioner's integrity. The basis for that perception is understandable to the committee, although it credits the nominee's testimony that she saw "nothing in the MDS report that would question the good faith and integrity of any [previous] chairman of the ITC." (*Id.*, at 77.)

In this regard, it should be noted that the nominee's testimony and submissions in connection with this nomination reflect that she had some reservations about the MDS report at the time it was submitted to her. For example, she stated that she thought some of its conclusions were not adequately substantiated. (Overview, at 6.) Yet, because "the recommendations were not on their face unsound," (8/6 Tr. at 64), she accepted the report and forwarded it to the oversight committees. The consequences of this decision have already been detailed. These actions buttress the suggestion that, because the nominee was satisfied with the conclusions of the report, she embraced and publicized it, heedless of the consequences for relations with her fellow Commissioners.

There is sometimes a fine line between strong, aggressive leadership and headstrong, ill-considered pursuit of a policy agenda. The facts of the MDS case raise the question of whether some of the actions of the nominee as Chairman of the ITC have crossed that line, to the detriment of her fitness to serve as a U.S. circuit judge.

IV. CONCLUSION

The issues discussed in this report lead a majority of the committee to conclude that it should not recommend the confirmation of the nomination of Susan W. Liebler to be U.S. circuit judge for the Federal Circuit.

Seven members of the committee conclude that, on the record as a whole, this nominee does not meet the high standards of judicial temperament, good judgment and objectivity that should be demanded of a nominee to a lifetime post as U.S. circuit judge. Two of these members of the committee, while concurring in the decision not to recommend this nomination to the full Senate, have concluded that the nomination should be reported without recommendation.

ADDITIONAL VIEWS OF MESSRS. THURMOND, HATCH, SIMPSON, GRASSLEY, SPECTER, AND HUMPHREY REGARDING THE NOMINATION OF SUSAN W. LIEBELER TO BE U.S. CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT

We disagree with the negative findings regarding Commissioner Susan Liebeler as set forth in the committee report. In our view, Mrs. Liebeler is a well-qualified nominee for the U.S. Court of Appeals for the Federal Circuit, and we strongly recommend her confirmation for that position by the Senate.

As shown in more detail below, Mrs. Liebeler has impeccable professional credentials for this extremely important and specialized appellate panel. Her legal career has included first-rate academic achievements at a distinguished law school, a court of appeals clerkship, private law practice, service as a distinguished professor of law, and, most importantly, 4 years of experience as a Commissioner and Chairman of the U.S. International Trade Commission. The list of organizations, legal scholars, and international trade practitioners endorsing her is impressive.

Given recent complaints that President Reagan has not nominated sufficient numbers of women for the federal courts, we find it especially ironic that the nomination of this well-qualified woman is meeting such delay and resistance. With her excellent qualifications and career achievements, she represents the very kind of outstanding woman lawyer that the Judiciary Committee should be pleased to endorse for this high judicial post. Against the factual background of Mrs. Liebeler's professional achievements and their recognition by a wide range of professional peers, the charges made by Mrs. Liebeler's opponents are without merit.

Susan W. Liebeler was born and raised in New Castle, PA, and attended undergraduate school at the University of Michigan. In 1963 she moved to Los Angeles, CA, to attend UCLA Law School, where she graduated fourth in her class, was senior editor of the Law Review and was elected to Order of the Coif. Following her law school graduation in 1966, Mrs. Liebeler clerked for Justice Gordon Files of the California Court of Appeals, and for several years was involved in the private practice of law specializing in corporate and commercial law. She served as associate general counsel to a New York Stock Exchange company and as general counsel to an American Stock Exchange firm. In addition to corporate and securities transactions, she represented her clients before several federal and State administrative agencies including the Securities and Exchange Commission, the Internal Revenue Service and the California Commissioner of Corporations.

In 1973 Mrs. Liebeler joined the faculty of Loyola Law School in Los Angeles where she became a professor of law, teaching courses in corporations, securities regulations, corporate finance, business and tax planning and financial regulation. While on the faculty of

Loyola, she served as a visiting professor at the University of Texas Law School, a consultant to several federal agencies, including the Environmental Protection Agency, the U.S. Price Commission and the U.S. Railway Association. From 1981-1982, as special counsel to Chairman John Shad of the Securities and Exchange Commission. As a professor of law she authored law review articles on corporate and securities law and appeared on various programs and panels sponsored by bar associations and academic institutions.

In 1984 Mrs. Liebler was appointed by President Reagan to be a Commissioner of the United States International Trade Commission (ITC). Shortly thereafter the President named her the ITC's Vice Chairman, and in 1986 the President named her Chairman. The ITC is responsible for providing data and analysis to trade policy makers in Congress and the executive branch, and also functions as a quasi-judicial tribunal making injury determinations under U.S. trade laws. An important part of the ITC's jurisdiction involves cases where imports infringe upon U.S. patents, trademarks and copyrights. As ITC Chairman and Commissioner, Mrs. Liebler has presented papers and spoken about various aspects of intellectual property and trade law to academic institutions, trade associations and industry groups.

In March 1987, the President nominated Chairman Liebler to be a judge on the U.S. Court of Appeals for the Federal Circuit (CAFC). Mr. Liebler is particularly well suited for appointment to the CAFC because of her wide range of experience in corporate, commercial and tax law as well as in intellectual property and trade matters. The CAFC, unlike other circuit courts, has specific subject matter jurisdiction: it hears tax, contract, federal personnel, just compensation, trade and intellectual property appeals. Mrs. Liebler has more than 20 years experience in private practice, government service and law school teaching and possesses an unusually broad background in several important areas of the court's jurisdiction in addition to international trade, for example:

Mrs. Liebler has substantial expertise in intellectual property law. As an ITC Commissioner she has participated and issued opinions in more than 100 intellectual property cases litigated at the ITC. (Holders of domestic intellectual property rights can seek relief at the ITC when their patents, copyrights and trademarks are infringed by imports.) ITC decisions in this area are reviewable in the CAFC. The CAFC has exclusive jurisdiction over appeals from patent cases in any U.S. district court. It also hears appeals from the Board of Appeals and the Board of Patent Interferences of the Patent and Trademark Office, the Commissioner of Patents and Trademarks and the Trademark Trial and Appeal Board.

Mrs. Liebler has significant experience in administrative law which she acquired as a private practitioner, as a consultant to several federal agencies including EPA, USRA and the Price Commission, as special counsel to the Chairman of the Securities and Exchange Commission, as Chairman and a Commissioner of the ITC, and as a member of the Administrative conference of the United States. The CAFC hears appeals from final decisions of several federal agencies.

Mrs. Liebelor has significant experience in tax matters. As a law professor she taught Business and Tax Planning and as a private practitioner she frequently dealt with tax matters. Many appeals from the claims court to the CAFC involve tax matters.

In private practice Mrs. Liebelor has had substantial experience in contract law. She is also knowledgeable in government contracts law because of her duties as ITC Chairman. The CAFC hears appeals from boards of contract appeals.

As ITC Chairman Mrs. Liebelor has been responsible for many personnel matters and has acquired experience in federal personnel law. The CAFC hears appeals from the Merit Systems Protection Board.

Mrs. Liebelor has considerable experience in reviewing the decisions of administrative law judges. ITC intellectual property cases are first heard by administrative law judges and then by the Commission.

Mrs. Liebelor also has experience in international trade cases, appeals from which are ultimately heard by the CAFC.

Confirmation Process

Susan Liebelor's nomination was sent to the Judiciary Committee in March 1987. She completed the committee's questionnaire as well as later responding to the committee's revised questionnaire. In response to requests from the majority, Mrs. Liebelor provided the committee with six looseleaf notebooks of materials.

A hearing date for her nomination was set for many months. A hearing originally scheduled for July 15, 1987, was postponed by the committee and rescheduled for August. A hearing was held on her nomination on August 6, 1987. Mrs. Liebelor was introduced to the committee by Senators Gramm (R-TX), Specter (R-PA) and Wilson (R-CA) who urged her confirmation. A second hearing on her nomination was held on November 3, 1987.

On November 12, 1987, in response to matters raised at the November 3, 1987, hearing, Mrs. Liebelor filed a 30 page report of "Additional Submissions to the Record" containing approximately 168 pages of additional exhibits. Mrs. Liebelor also responded to 28 additional questions which were submitted to her. On November 17, 1987, Mrs. Liebelor filed 61 pages of written answers, and included another 192 pages of exhibits. Despite many requests from the minority that her name be placed on the agenda for a vote, her name did not appear on the committee's agenda until February 4, 1988, but consideration of her nomination was laidover at the request of the majority. Mrs. Liebelor's name was on the agenda for the committee's February 18, 1988, executive session, however, that meeting was canceled. Her nomination was not voted on until February 23, 1988, 11 months after it was sent to the committee. On that date the committee voted 8 to 5 to send her nomination to the floor without recommendation.

ABA RATING

Mrs. Liebeler received a unanimous qualified rating from the Standing Committee on the Federal Judiciary of the American Bar Association.

The ABA in its publication "The Standing Committee on the Federal Judiciary—What It Is and How It Works" has stated that the ABA committee's evaluation of prospective nominees is directed primarily to professional qualifications and specifically includes professional competence, integrity and judicial temperament:

Professional competence encompasses such qualities as intellectual capacity, judgment, writing and analytical ability, industry, knowledge of the law and professional experience.

The ABA Committee believes that political activity and public service are valuable experiences, but that such activity and services are not a substitute for significant experience in the practice of law. In investigating temperament, the ABA Committee looks to the prospective nominee's compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice, among other factors. The prospective nominee's character, integrity and general reputation in the legal community are investigated, as are his or her industry and diligence. Community and professional contributions are considered relevant.

Based on these stringent standards, the ABA's committee scrutinized Mrs. Liebeler's professional competence, integrity, and judicial temperament and unanimously found her qualified for appointment to the U.S. Court of Appeals for the Federal Circuit.

It should be noted that a rating of "qualified" is the norm and traditionally lawyers who have not served as judges or specialized in litigation practice do not receive a higher rating than qualified. In fact, a fair number of President Reagan's nominees to the court of appeals have received this rating and all of them have been approved by the Senate.

THE FEDERAL CIRCUIT BAR ASSOCIATION

The Federal Circuit Bar Association found Susan Liebeler to be "well qualified" for appointment to the Court of Appeals for the Federal Circuit. The President of the Federal Circuit Bar Association's Judicial Selection Committee testified at Mrs. Liebeler's November 3, 1987, hearing. He testified that:

We have carefully examined the qualifications of Susan Liebeler and found her to be well qualified for appointment to the Court of Appeals for the Federal Circuit. She possesses the high ability, integrity, and judicial capacity required for this important court.

The Federal Circuit Bar Association is a national organization of more than 1,400 lawyers who practice before the U.S. Court of Appeals for the Federal Circuit. The members and leaders of the association come from all areas of the court's jurisdiction. The associa-

tion was organized to unite the many different practice groups with the view of improving the administration of justice. The association provides a forum for common concerns and dialogue between bar and court, government counsel and private practitioners, and litigators and corporate counsel. Periodically the association sponsors regional seminars reviewing current practice in the court.

The charter of the Association's Judicial Selection Committee provides

The primary responsibility of the Judicial Selection Committee should be to create an environment which will cause the appointment of highly qualified judges to the CAFC. Such an environment should be created through:

1. Continued education of the White House and Department of Justice officials involved in the appointment process of the importance of the CAFC and the necessity to appoint judges commensurate with the status of this Court.

2. Timely notice to the Bar vacancies, together with a brief description of the CAFC.

3. Evaluation of candidates and inclusion of only highly-qualified persons on a list approved by the Board of Governors of this Bar Association. The ability, integrity, and judicial capacity shall be the criteria for any judicial selection activity of this organization. Expertise in any legal speciality shall not be a prerequisite for recommendation but may be considered in assessing the ability of the candidate. This list shall be made available to the appointing officials, as well as to the Bar in General.

4. Opposing the nomination and appointment of unqualified judges to this Court.

5. Continued search for means to assure the appointment of highly-qualified judges to this Court.

The Judicial Selection Committee of the Federal Circuit Bar Association applied these high standards in scrutinizing Mrs. Liebler's qualifications, found her "well qualified" for appointment to the Federal Circuit, and strongly supported her confirmation.

THE ITC TRIAL LAWYERS ASSOCIATION

By letter and in testimony before the Judiciary Committee, the ITC Trial Lawyers Association endorsed the nomination of Susan Liebler to be U.S. Circuit Court Judge for the Federal Circuit.

The Trial Lawyers Association is an association of attorneys who practice or are otherwise interested in intellectual property cases before the International Trade Commission. The association was formed for the purpose of establishing a means of communication among the members of the bar and the Commission concerning intellectual property practice.

At Mrs. Liebler's November 3, 1987, hearing, the association's president appeared and testified to the association's interest in CAFC appointments:

The Association takes an active interest in the work of the Court of Appeals for the Federal Circuit, since this is the appellate court for decision of the International Trade Commission. Further, in view of the fact that many of the

members of our association are patent attorneys, and appeals of patent cases from the federal district courts are heard only by the Court of Appeals for the Federal Circuit, the decisions of that court are of special interest to that segment of our membership.

In view of the importance of the Court of Appeals for the Federal Circuit to our members, the Association has taken a position that candidates for judgeships on the federal circuit should bring to the court expertise in intellectual property and trade law, and should be evaluated further on general judicial qualifications.

The president of this association explained why they urged the confirmation of Susan Liebler:

The members of our Association have had the opportunity over the last several years to observe and evaluate the performance of Chairman Liebler, both as a member of the Commission and later as Chairman. While individual members may disagree with particular decisions of the Commission, that is to be expected. Nevertheless, the ITC Trial Lawyers Association is pleased to lend its endorsement to the nomination of ITC Chairman Susan Liebler, because her expertise in trade law, to serve as a judge of the Court of Appeals for the Federal Circuit.

OTHER ENDORSEMENTS

Mrs. Liebler has also earned the respect and endorsement of many individuals in California where she spent many years in private practice and as a law school professor. She has received endorsements from present and former presidents of the Los Angeles County Bar Association, the Association of Business Trial Lawyers, the Los Angeles Trial Lawyers Association, as well as the Federal Bar Association, the National Association of Women Judges and the National Women's Economic Alliance. In addition, some of the nation's leading trade lawyers have submitted testimony, statements and letters to the Judiciary Committee supporting Mrs. Liebler's nomination. Many law professors teaching trade law and several law school deans have also written to the Judiciary Committee in support of her nomination. These include:

Prof. William Alford of UCLA Law School, a former practitioner before the ITC, who specializes in international trade and intellectual property law stated:

I believe she has discharged her responsibilities on the ITC with exceptional skill and integrity. In the face of considerable pressure from across the political spectrum, she has resisted the temptation to search for expedient solutions and instead has steadfastly sought to apply our trade laws as she, in her best professional judgment, believes them to be written.

Prof. Jonathan Baker of the Amos Tuck School of Business Administration of Dartmouth College, who has appeared before the ITC, wrote:

I have been impressed with Chairman Liebeler's performance at the ITC. In my experience she exhibits a deep understanding of complex legal and policy questions, and writes carefully reasoned decisions.

James Bierman of Foley & Lardner in Washington, D.C., who litigated a major case before the ITC, stated:

[S]he stands out as an excellent lawyer among Commission members who are not trained in the law. * * * In the case I litigated before her. * * * Susan Liebeler's concurring decision was clearly most lucid, logical and well thought out. Even though the other Commissioners also ruled in my client's favor on the law of the case, it was her reasoning that made best sense from a statutory and regulatory point of view.

Howard Boltz, Jr., of Rogers & Wells, the president of the Association of Business Trial Lawyers and vice president of the Federal Bar Association, Los Angeles chapter stated:

I strongly urge the nomination and approval of Susan Liebeler to the United States Court of Appeals for the Federal Circuit based upon her outstanding record as a lawyer, professor, author and Commissioner for the United States International Trade Commission. The range of Ms. Liebeler's experience with the complex issues presented to the Federal Circuit amply qualify her for appointment to the Court of Appeals. * * * The Court of Appeals will be fortunate to have such a talented and astute addition to its bench.

Prof. Thomas Campbell of Stanford Law School wrote:

I am quite familiar with Ms. Liebeler's work as a member and chair of the International Trade Commission. I have found it to be uniformly of the best quality.

Richard Cunningham, Esq., of Steptoe & Johnson, one of the nation's leading trade lawyers, a member of the ABA Standing Committee on Customs Law and vice chairman of the ABA Committee on Customs Law of the Administrative Law Section, and past chairman of the ABA Committee on International Litigation and chairman of the ABA Committee on Legislation, stated:

Susan Liebeler has the intellect, character and judicial temperament to be an exceptionally fine appellate judge. Moreover, she will bring to that court experience in international trade law issues and familiarity with the economic analyses utilized in international trade cases at the administrative level—capabilities that will be invaluable to the Court of Appeals for the Federal Circuit over the next decade.

Mr. Cunningham stated further:

Susan Liebeler is eminently qualified to serve on the Court of Appeals for the Federal Circuit. She will bring to that Court intelligence, international trade law experience, fairness and impartiality. I urge that she be confirmed.

Kenneth Dam, former professor of law and provost at the University of Chicago, former Deputy Secretary of State and Treasury and currently vice president Law and External Relations of IBM Corporation stated:

I would like to urge confirmation of Susan W. Liebeler as a judge on the Court of Appeals for the Federal Circuit. I have known her for over fifteen years and have the highest regard for her professional competence. She is a highly able lawyer with not only a broad background but also expertise in the subject matter of the court in question. I cannot think of anyone better qualified as a lawyer for the Court of Appeals for the Federal Circuit.

Pierre F. de Ravel d'Esclapon, Esq., of Donovan Leisure Newton & Irvine, who has represented both domestic and foreign clients in many cases before the ITC, stated:

I have been impressed with Chairman Liebeler since she joined the International Trade Commission. * * * In her opinions under Section 337 * * * Chairman Liebeler has developed a cogent and reasonable framework for protecting intellectual property rights.

Larry Feldman of Fogel, Feldman, Ostrov, Ringler & Klevens, president of the Los Angeles County Bar Association and past president of the Los Angeles Trial Lawyers Association stated:

I have known Mrs. Liebeler for approximately 15 years. She is an outstanding member of the Los Angeles legal community. * * * As the past president of the Los Angeles Trial Lawyers Association and presently as the president of the Los Angeles County Bar Association, I have had an opportunity to work with, oppose and observe many lawyers. Susan Liebeler is among the first rank of this group. She is well qualified to serve on the Federal Circuit.

Stanley Fisher, president of the Federal Bar Association wrote:

Ms. Liebeler has had an outstanding legal career having held numerous positions in the federal government which she has served with great distinction. * * * In each of these positions, Ms. Liebeler has been a role model to many who have chosen a career in the federal service. Moreover, during these past twenty years, she has consistently demonstrated her substantive diversity, commitment to excellence and ability to adhere to the strength of her convictions. These qualities more than qualify her to serve on the Court of Appeals for the Federal Circuit.

Arnold Forster, of Shea & Gould in New York and general counsel to the Anti-Defamation League, wrote:

Those familiar with Chairman Liebeler's performance on the Commission recognize in her a person of high judicial character, most impressive knowledge of her subject, expertise in applying its law to the facts, and of a temperament most suited to serve on the Federal Circuit Court of Appeals. Her estimable record in this respect almost

makes it seem as if from the very beginning of her distinguished career, Commissioner Liebeler prepared for this important assignment for which she has now been nominated. In light of Commission Chairman Liebeler's evident excellent qualifications for this serious judicial responsibility, I respectfully commend your most favorable consideration to her appointment.

John Greenwald of Wilmer, Cutler & Pickering, former Deputy Assistant Secretary of Commerce for Import Administration and former Deputy General Counsel in the Office of the U.S. Trade Representative stated:

To her credit, Ms. Liebeler has struggled against this tendency (the tendency toward ad hoc decision making); she has taken pains to develop a well-defined and clearly articulated approach to injury determinations in Title VII cases. Because of this, her opinions are coherent and consistent. * * * Ms. Liebeler's decisions in Title VII cases have, in my view, been within her statutory mandate.

Prof. Malvina Halberstam of Cardozo School of Law of Yeshiva University, who served with Ms. Liebeler on the Loyola Law School faculty, wrote:

I think her probing analytical mind, strong sense of justice, and devotion to hard work, will make her an excellent judge and urge her confirmation.

Pat Harrison, president of the National Women's Economic Alliance, a nonpartisan organization comprising men and women leaders from business, industry and government working together to increase economic and career opportunities for women, stated:

I welcome the opportunity to support the confirmation of Susan Liebeler, nominee for the U.S. Court of Appeals for the Federal Circuit. Mrs. Liebeler's judicial experience and professional achievements are outstanding and she has been endorsed by her peers, by mentors, by professional organizations. She is more than qualified, and if integrity, ability and judicial capacity count—she should be confirmed. Her confirmation will telegraph an important message to women and all citizens, Democrats and Republicans: that our elected officials are committed to encouraging and affirming the contribution of the best and the brightest; that leadership, whether demonstrated by women or Blacks or Hispanics, is a quality that government needs in quantity.

Diane Klinke, Deputy General Counsel, Municipal Securities Rulemaking Board, worked with Mrs. Liebeler at the SEC, and stated:

I have found Ms. Liebeler to be extremely bright and thoughtful in her analysis of legal issues. She is open-minded and fair, and has a great ability to work with others to reach a consensus. I believe Ms. Liebeler is very

well suited to be a judge on the Federal Circuit Court of Appeals and will be a credit to that court.

Dean Travis Lewin of Syracuse University College of Law, who served with her on the faculty of Loyola Law School, commented:

She is a fine judicial candidate with the temperament, bearing and experience that will bring to the bench one of our finest laywers. . . . She is one of the brightest lawyers I have met; one of the strongest; one of the most sensitive. We could not do better with an Administration recommendation than to have Susan on the bench; we would be hard pressed to do better with a Democrat.

Judith McConnell, President-Elect of the National Association of Women Judges, stated:

There have been few appointments of women to the federal bench, a subject of major concern to our organization. It is of great importance that qualified women be given an opportunity to serve in this capacity. Susan Liebeler has a reputation in California for hard work, integrity, scholarship, and forthrightness. . . . Her work, both in California and nationally, shows she has earned this appointment.

Prof. Fred S. McChesney, of Emory Law School and a Visiting Professor at the University of Chicago Law School, who for several years practiced international trade law, stated:

I have followed Ms. Liebeler's work at the International Trade Commission with considerable interest and admiration. The levels of analytic rigor and interpretive skill that she has exhibited throughout her career at the ITC are invaluable assets. . . . As the only lawyer at the ITC, Ms. Liebeler has shown an ability reasonably to interpret the law in countervailing duty and dumping cases, and her opinions have greatly improved the logic and consistency of trade law issuing from the ITC. Her interest and great ability in financial analysis are likewise evident in her opinions.

Peter Pancione of Gipson, Hoffman & Pancione in Los Angeles, formerly California Commissioner of Corporations, who worked with Mrs. Liebeler on the legal staff of a large New York Stock Exchange company stated:

Even at that early stage of her legal career, her maturity, judgment and analytical abilities were widely recognized and admired. To reiterate, I highly recommend that Ms. Liebeler be appointed to the United States Court of Appeals for the Federal Circuit.

Dean Monroe Price of Cardozo School of Law of Yeshiva University, wrote:

Ms. Liebeler will make an excellent circuit judge. She has enormous personal integrity. She is very bright. She has distinguished herself as a private practitioner, a professor of law, and most recently as Commissioner and chairman of the International Trade Commission. She is

particular¹ well suited for appointment to the Federal Circuit because of her extensive background in trade law and in the laws of patent and intellectual property, areas which are a significant part of the case load of the Federal Circuit. I am especially pleased to be able to support the nomination of such a highly qualified woman to the Court of Appeals. She is both bright and assertive—I have no doubt that she has the qualities of judgment and temperament that will make her a successful member of the Court of Appeals.

Martha Robinson, professor emeritus at Loyola Law School, a colleague of Mrs. Liebler's for many years on the Loyola faculty, stated:

In my opinion she has a quick and penetrating intelligence, is analytical, and is well read in her fields of legal expertise. Perhaps equally important is the highly intuitive quality of her mind and her warmly collegial nature. From my long association with her I have no doubt that Mrs. Liebler will be a respected and conscientious judge with a deserved reputation for well considered judicial conduct.

Loren Rothschild, president of American Protection Industries, a member of the Los Angeles County Judicial Procedures Commission, and formerly president of the Los Angeles Association of Business Trial Lawyers and Chairman of the Los Angeles County Bar Association's Committees on Court Reform and Court Financing, stated:

My own acquaintance with her and her reputation convince me that she is hard working, intelligent and forthright. I have high regard for her abilities and integrity. In my dealing with her, she has always exhibited a demeanor suitable to a judge. She is patient, calm and courteous. She is highly regarded by the students who attended her courses. * * * I recommend her appointment without reservation.

Harvey Saferstein of Irell & Manella, a member of the Board of Trustees of the Los Angeles County Bar Association, president of the Legal Aid Foundation of Los Angeles and a former Regional Director of the Federal Trade Commission, stated:

Ms. Liebler has been an outstanding member of the Los Angeles legal community and would be an excellent addition to the Federal circuit. * * * I feel honored to recommend Ms. Liebler to the Federal Circuit.

Minda Schecter of Graham and James in Los Angeles, a former colleague of Mrs. Liebler's on the Loyola faculty, commented:

Ms. Liebler's intellectual capabilities are extraordinary. She is a very hard worker and undertakes extensive well-balanced analyses of every issue to be sure she has considered all factors and reached a reasoned conclusion. In dealing with student issues, Mrs. Liebler demonstrated an exemplary sense of equity and fairness. It is clear to me and

other member of the faculty and student body that Susan Liebeler has all the qualities and judicial temperament to be a outstanding Judge for the United States Court of Appeals for the Federal Circuit. I vigorously and wholeheartedly support her appointment and truly believe that a stronger and more capable candidate could not be found.

Tom Schaumberg of Howrey & Simon in Washington, D.C., who practices before the ITC, stated:

I have found Chairman Liebeler to be open-minded, thoughtful and extremely intelligent. . . . I have the highest respect for Chairman Liebeler's integrity and ability.

Prof. Warren Schwartz of the Georgetown Law Center, who has taught international trade law for more than 20 years and authored many articles and books on the subject, commented:

Her opinions identify the legal and factual issues which must be resolved, with complete candor state why those issues are resolved as they are and provide clear guidance to ensure fair and predictable application of the law to future cases. It is exactly this lawyer-like craft which constitutes the essential feature of good judicial decisions and opinions.

Hon. John Shad, U.S. Ambassador to the Netherlands, formerly Chairman of the Securities and Exchange Commission, for whom Mrs. Liebeler served as special counsel, commented:

I would like to highly commend to your favorable consideration the nomination of Ms. Susan Liebeler to the U.S. Court of Appeals for the Federal Circuit. * * * She has a keen legal mind, great integrity and ability. I believe she would serve with distinction.

Prof. Alan Swan of the University of Miami Law School characterized ITC decisions as bearing

all the hallmarks of poor craftsmanship. Far too often those decisions exhibit a wooden literalism, economic illiteracy and a woeful lack of imagination or common sense. * * * On the Commission, Susan Liebeler has been a breath of fresh air.

Prof. Alan Sykes of the University of Chicago Law School, who also practiced international trade law and appeared before the ITC, stated:

I have found her to be a fair and thoughtful decision-maker. She is attentive and open-minded, and her probing questions reveal her to have an incisive legal mind. * * * Her most important contributions lie in her opinions. She is meticulous about them, and clearly articulates the basis for her decisions. Her opinions have greatly clarified the analysis of the Commission in several areas of the law. Her consistency from case to case, and her analytical rigor, have considerably raised the quality of legal analysis at the Commission.

Lloyd Tevis, professor emeritus and former dean of Loyola Law School, who served as chairman of the committee which evaluated the performance of members of the faculty for purposes of tenure, stated;

I strongly believe that Susan Liebler is a superior nominee for appointment as an appellate judge. I respectfully urge confirmation of her appointment.

Jack Gumpert Wasserman of Freeman, Wasserman & Schneider in New York who for the past two decades has practiced regularly before the U.S. International Trade Commission, and a member of CITBA, wrote:

I have specialized in customs and international trade law for over two decades, but this is the first letter which I have written in connection with a nomination to the federal judiciary (see exhibit "A"). This letter is engendered by the disparaging and clumsy testimony presented to your Committee on November 3, 1987 by the President of the Customs and International Trade Bar Association ("CITBA"). Those comments (which I saw only this week for the first time) enraged me, in large measure because of the *ad hominem* nature of the testimony. I am a member of CITBA, but its Directors did not circulate copies of either the written report submitted to your Committee or the testimony. * * * Against this background, I offer the following comments in support of Commissioner Liebler's nomination. I agree totally with CITBA's recognition of Chairman Liebler's intelligence. Chairman Liebler's conduct of the Commission's public hearings have been consistently fair and balanced. * * * Chairman Liebler's oral and written decisions have been lucid and well-reasoned. There is no ambiguity surrounding Chairman Liebler's opinions—all parties know precisely where she stands on a given issue. * * * I support Chairman Liebler's nomination and urge that it be approved.

Barry Weiss of Pepper, Hamilton & Scheetz in Los Angeles, the partner under whose supervision Mrs. Liebler worked in private practice, stated:

I always found Ms. Liebler to be an extremely intelligent and capable attorney. She was open-minded, thoughtful, and worked extremely well with others as part of a team. In my opinion she certainly has a judicial temperament, and based on my work experience with her and her development over the years, I am of the opinion that she is extremely well qualified for the judicial position for which she is being considered.

Prof. Diane Wood of the University of Chicago Law School, stated:

I have read many decisions of the ITC, and I have been impressed over and over again with the quality of Liebler's opinions. She brings an intellectual framework to a developing area of the law that is sorely in need of predict-

ability and even-handed administration. Her opinions consistently display an honest and conscientious effort to grapple with the sensitive issues raised in the various trade statutes.

THE CITBA REPORT

At her November 3, 1987, hearing the Customs and International Trade Bar Association (CITBA), a small association of approximately 300 customs lawyers, criticized Mrs. Liebeler's decisionmaking in trade cases, alleging that her decisions are controlled by her "free-trade ideology." In response to a question from Senator Thurmond, David Elliott, testifying on behalf of CITBA, stated that the CITBA did not question Mrs. Liebeler's intellectual capacity or integrity. Mr. Elliott stated that CITBA's only area of concern was with her judicial temperament and the reasons for that concern were set forth in CITBA's report.

One of the more surprising revelations which came out at the hearing was the fact that representatives of CITBA *made no effort* to interview Mrs. Liebeler regarding their concerns or the negative allegations contained in their report, and so testified at her November 3, 1987, hearing. Many months before the hearing she had met with members of CITBA's Judicial Selection Committee in her office and discussed briefly her causation analysis in antidumping and countervailing duty cases. She was not asked to respond to any of the negative allegations set forth in the CITBA report. Conversely, Mr. Clarence T. Kipps, Chairman of the Federal Circuit Bar Association's Judicial Selection Committee, stated at Mrs. Liebeler's hearing that he had raised with her these criticisms and was satisfied that "*they were unfounded.*"

The report misquoted her opinions and in one case misrepresented the date of one of her opinions to make it appear that it was inconsistent with a court of appeals decision that was decided *after* her opinion was handed down, not before her decision as the report alleged.

The report has been discredited by leading members of the trade bar, including Richard Cunningham of Steptoe & Johnson, John Greenwald of Wilmer, Cutler & Pickering, and Herbert Wamsley, executive director of Intellectual Property Owners' Inc., and by Mrs. Liebeler who filed an extensive rebuttal with the committee. Richard Cunningham, in his testimony submitted to the committee, stated that the CITBA report "shows a rather fundamental misunderstanding of how trade laws work." He further stated that

CITBA's attack on Commissioner Liebeler's trade case opinions shows upon even the most cursory examination, no instance in which she has disregarded statutory criteria or statutorily-enumerated economic factors. * * * In short, Commissioner Liebeler scrupulously adheres to the statute, but weighs the evidence differently than CITBA seems to have wanted.

The CITBA report contained the following inaccuracies:

1. CITBA gave an inaccurate date for one of Mrs. Liebeler's International Trade Commission opinions, asserting that it was written *after* the Federal Circuit had decided a disputed point.

In fact, her opinion was issued 10 months *before* the Federal Circuit's decision. CITBA's claim that "Mrs. Liebeler [has an] apparent unwillingness to put aside her personal beliefs where a court has ruled against her position" is inaccurate. CITBA acknowledged its error in a December 7, 1987, letter to the committee. As she testified at her November 3, 1987, hearing, *Corning Glass Works v. United States*, 799 F.2d 1559 (Fed. Cir. 1986) was not discussed in her opinion in *Certain Woodworking Machines*, Inv. No. 337-TA-174, because *Corning* was decided on August 27, 1986, some 10 months *after* the Commission decided *Woodworking Machines* on June 16, 1986 (actually *Woodworking* was issued in October 1985). The question in any particular case of how much injury is enough is very difficult, but Mrs. Liebeler relies heavily, as a Commissioner should, on the opinions of the Federal Circuit as a guide.

2. CITBA accused Mrs. Liebeler of ignoring precedent and statute by using a *per se* injury test in *Certain Optical Waveguide Fibers* (ITC Inv. No. 337-TA-189). As support for this assertion CITBA quoted from her opinion in this case. The quotation from her opinion clearly recognizes that the Commission must employ an injury test but suggests that in patent cases the Commission should employ its most lenient injury test.

Additionally, CITBA omitted two critical footnotes from a passage it quoted in another of Mrs. Liebeler's opinions that changed the nature of what she was saying. In one of the opinion's footnotes that CITBA omitted from the passage it quoted, Mrs. Liebeler discusses the controlling *precedent*. In the other she cross-references another part of her opinion where she discusses the quantum of injury required by the *statute*. Had the two footnotes been included in CITBA's quote, it would have been immediately obvious that she did not use a *per se* injury test.

3. CITBA also criticizes her five-factor causation analysis in their report. CITBA stated that Mrs. Liebeler believes that material injury cannot exist unless several of the five factors are present. Mrs. Liebeler testified that this was not true. She uses her five-factor test to analyze causation under 19 U.S.C. section 1677 (7)(B) and (C)(iii). Mrs. Liebeler has used this analysis to carry out congressional intent in an attempt to isolate the effects of dumped or subsidized goods on the domestic industry. Other Commissioners also struggle with the rather difficult responsibility of assessing causation and some follow more informal, intuitive approaches. Mrs. Liebeler uses a more formal economic approach, and as a result, her causation analysis is clearly stated and predictable.

However, recently Chairman Liebeler's approach to causation analysis in antidumping cases was criticized by a single judge of the Court of International Trade, the initial reviewing court for ITC antidumping and countervailing duty cases, in *USX Corp. v. U.S.*, Slip Op. 85-03-00325 (Ct. Int'l. Trade, March 15, 1988). The court's opinion was written in the second remand of a case which

originally was filed over 4 years ago. The court's disapproval of Chairman Liebler's analysis centers on the court's perception that she required predatory intent in order to rule in favor of the domestic industry. It appears clear from her written opinion and from her oral and written answers to questions from the committee that Mrs. Liebler does not think predatory intent is required or relevant in an antidumping case. The court's decision in *USX* is not a final resolution of this case which has been remanded to the Commission for further consideration. In the earlier remand the court criticized the approaches used by *all* other Commissioners in the case. Chairman Liebler and another Commissioner will provide the court with a fuller explanation of their views in their remand opinions.

ITC Commissioners do not have the opportunity to craft their views and opinions under the same conditions that federal judges operate under. ITC opinions must be written and issued under strict statutory deadlines and the opinions cannot reveal any of the confidential business information on which a Commissioner's decision is based. Thus it is not particularly significant that a Commissioner's views are not always upheld on appeal. As noted, the court in *USX* earlier criticized the opinions of other Commissioners in the same case. Indeed, it is surprising that, given the conditions under which Commissioners must issue opinions, only a very small percentage of the more than 400 preliminary and final antidumping and countervailing duty cases in which Mrs. Liebler participated and issued opinions have been remanded to the Commission and only in *USX* has there been specific criticism of Mrs. Liebler's causation analysis.

4. The CITBA report contained serious mischaracterizations of her written opinions. For example, CITBA stated that:

Thus, in *Agricultural Tillage Tools from Brazil*, Inv. No. 701-TA-223 (Final), USITC Pub. No. 1761 at 24-27 (Oct. 1985), she found to be *legally insignificant* a 15.9 percentage point increase in market share by subsidized imports, an 8.06 percent subsidy rate, and a price decline in one of two sizes of the merchandise under consideration because . . .

Nowhere in *Tillage Tools* did Mrs. Liebler characterize the market share, subsidy, or price decline as legally insignificant. Instead, she stated that:

There is substantial variation among discs of the same diameter, there has been no significant decline in disc prices, and discs from Brazil account only for a portion of imports of discs. In light of the nonfungible nature of discs, a subsidy of 8.06 percent ad valorem is not very large. Thus, *although there has been substantial growth in imports from Brazil, and Brazil now has a moderate share of the United States market*, the second through fifth factors compel me to conclude that imports of disc subsidized by the government of Brazil do not materially injure or threaten . . . the domestic industry . . . (emphasis

added). (Additional and Dismaying Views of Vice Chairman Licheler.)

CITBA also confused the price data collected by the Commission. The Commission staff report is that one contained price information of five common tilings and specifications. Most of that information was confidential. In addition, Mrs. Licheler noted that there were substantial differences among tiles of the same diameter and that the products under investigation were not very homogeneous. After considering the price information and noting that the various products were not fungible she concluded on the basis of confidential information that there had been no significant decline in prices. Since CITBA presumably did not have access to the confidential information, it is difficult to know the basis for their assessment of the price data available to the Commission.

5. Another criticism by CITBA is that Mrs. Licheler has refused to cumulate the volume, price, and impact of dumped imports with subsidized imports, and that her failure to use this methodology known as "cross-cumulation" violated legislative intent. Cross-cumulation was, until recently, a very unsettled issue.

Prior to 1984, it was not the practice of the Commission to cumulate imports. The 1984 amendments mandating cumulation of certain imports were silent on the issue of cross-cumulation. None of the Commissioners cross-cumulated in cases covered by the 1984 amendments until *Bingham & Taylor v. U.S.*, 627 F. Supp. 700 (Ct. Int'l. Trade 1985), where the Court of International Trade held that the Commission should cross-cumulate. The Commission was unanimous in its decision to appeal the case to the Federal Circuit. While that case was on appeal, some Commissioners cross-cumulated and some did not. For example, in *Carters Steel Sheets and Straps*, 701-TA-269 and 270 (Preliminary), USITC Pub. No. 1087 at 11, notes 27-28 (May 1986), Commissioners Starn, Brundage and Licheler did not cross-cumulate.

Indeed, when the issue finally reached the Federal Circuit, in *Bingham & Taylor v. United States*, 713 F.2d 1402 (1987), the court recognized that "the Commission as an entity never cross-cumulated." *Id.* at 1405. The Federal Circuit recognized the difficulty of interpreting the 1984 amendment that inaugurated the problem: "We find the statutory language suffers from some ambiguity." . . . *Id.* In the end, though, the Federal Circuit decided that the common character of dumped and subsidized imports as unfair intrusions into the U.S. market should prevail over their differences. The court felt more comfortable than usual in not deferring to the Commission on the issue, because the case was one of first impression. *Id.* at 1407. Mrs. Licheler, of course, has since followed the Federal Circuit's opinion in every case.

6. CITBA claimed that Mrs. Licheler stated that she could disregard statutory criteria unless the domestic market could be harmed or threatened by a relatively small level of imports or there was at least a 2.5-percent import market penetration. CITBA incorrectly reported that in one of Mrs. Licheler's opinions, she stated that she did not have to consider the criteria specified by Congress in certain cases.

What Mrs. Liebeler really stated in *Welded Carbon Steel Pipes and Tubes from Thailand and Venezuela* was that in this particular case, where the supply and demand for line pipe were not inelastic, the cumulated imports of less than 2.5 percent were too small to cause material injury. She also stated that if the supply and demand had been highly inelastic, she would not have found that imports representing less than 2.5 percent of consumption could not threaten or cause material injury.

Not only did she discuss the statutory criteria in detail in this case, but Mrs. Liebeler joined the Commission majority in applying statutory criteria to find that the domestic industry was materially injured. She never stated that she could or would disregard statutory criteria.

7. CITBA has based its support for their assertion that Mrs. Liebeler decided cases according to her own beliefs, rather than the relevant statutes, on comments by another ITC Commissioner in *Certain Ethyl Alcohol from Brazil* (ITC Inv. Nos. 701-TA-239 and 731-TA-248).

CITBA failed to disclose, however, that:

a. The comments by this particular Commissioner were in the dissenting opinion; the Commission voted 4 to 1 *against* his position.

b. The comments of this Commissioner have nothing to do with the *Ethyl Alcohol* cases.

8. Another group of Mrs. Liebeler's decisions that CITBA criticizes involves section 337, a section of the trade laws that serves mainly to protect the owners of American patents, copyrights, and trademarks from foreigners who pirate them. CITBA claimed that Mrs. Liebeler ignored Congress' requirement that an American industry be injured before it can receive relief from the Commission. This assertion by CITBA is incorrect.

In a November 9, 1987, letter to the committee from Herbert C. Wamsley, executive director, Intellectual Property Owners, Inc., commented on the section of the CITBA report that pertains to Mrs. Liebeler's opinions under section 337 (see exhibit "B"). Mr. Wamsley criticized CITBA's analysis of her opinions and concluded that Mrs. Liebeler has followed the statute and court interpretations of it.

9. The CITBA report stated that the CITBA Judicial Selection Committee interviewed all Commissioners who served with Mrs. Liebeler on the Commission, as well as numerous attorneys who practice before the Commission and Commission personnel. CITBA does not disclose in its report the names of the interviewees, the length and type of interviews, the questions asked, or the context in which the responses they report were made. In a November 10, 1987, letter to Chairman Biden of the Judiciary Committee from Vice Chairman Brunsdale of the ITC, the Vice Chairman describes her "interview" with a CITBA representative as a brief telephone call in which she was asked very few questions (see exhibit "C"). She stated that she was not asked to respond to any criticisms that might have

been leveled at Mrs. Liebeler and that she was not asked to comment in any detail on her working relationship with Mrs. Liebeler. Additionally, numerous individuals known to support Mrs. Liebeler were never contacted and Mrs. Liebeler herself was never contacted and given the opportunity to respond to the allegations made against her.

The Commission is a collegial body and each Commissioner brings his or her own experience and professional training to bear on the issues before it. It is not surprising that there are substantial differences and disagreements among the Commissioners and staff on many of the important and difficult issues which the Commission must address under the import relief laws. Indeed dissension at the Commission in past times reached such a level that Congress was forced to address the issue.

A 1977 House report, for example, noted that there had been "a completely unwarranted amount of time spent by Commissioners debating minor administrative or personnel matters" and that the "inability of the Commissioners to agree among themselves" had severely damaged effective agency administration. More specifically, the House Ways and Means Committee noted that:

The amount of hours the Commission has spent failing to decide on minor administrative matters is poor management. The dissension created ultimately impacts on the substantive work of the Commissioners and their ability to function as a *Commission*. The attention in public to minutiae cheapens the professional product of the Commission in the domestic and foreign trade communities."

Similar concerns have also been raised by the Senate Finance Committee and by individual members of Congress.

The highly controversial nature of the issues with which the Commission deals lend themselves to strong differences in opinion. Moreover, members of the Commission frequently come from different types of backgrounds (indeed differences in political affiliation are statutorily mandated). In short, disagreement within the ITC is neither new nor unexpected.

The CITBA report also mentioned some negative statements made by some members of the trade bar, but the context in which these remarks were made is not given and is incomplete. However, it is important to note that the Judiciary Committee received, as previously mentioned, many favorable letters of support from such leading members of the trade bars as Richard O. Cunningham of Steptoe and Johnson, and John Greenwald, of Wilmer, Cutler and Pickering, strongly endorsing Mrs. Liebeler's nomination. In fact, Mr. Cunningham stated:

It must express genuine alarm at that portion of the CITBA paper (at pages 3-5) that purports to quote largely derogatory remarks by an unstated number of people who the CITBA Board claims to have "interviewed." None of the interviewees is named. In no instance is the quoted remark put in any context. We are not given the questions to which any given remark responded. This denies Commissioner Liebeler even the rudiments of fair play. One

has to go back to hearings in the early 1950's by a very different Senate Committee to find a submission that stoops to such a level.

The committee also received favorable testimony from Clarence Kipps on behalf of the Federal Circuit Bar Association; Robert S. Swecker on behalf of the ITC Trail Lawyers Association; and written testimony submitted by Prof. Warren Schwartz of the Georgetown University Law Center. In addition, many other members of the trade bar and trade community, as well as other professors teaching courses in trade law, have commented favorably on Mrs. Liebeler's nomination, competence, integrity and temperament.

10. The CITBA report stated that their Judicial Selection Committee conducted interviews of members of the faculty, former student body and administration of Loyola Law School. According to the report a series of individuals offered negative comments about Mrs. Liebeler's performance at Loyola and her fitness for appointment to the bench. Again, CITBA never contacted Mrs. Liebeler to discuss their concerns regarding her performance at Loyola.

During the course of her tenure at Loyola, Mrs. Liebeler taught more than 2,000 students. It would not be surprising that some students and even faculty might criticize her. It would be even more surprising, however, that any type of fair sampling of members of the Loyola community would result in the uniformly negative comments reported by CITBA.

Mrs. Liebeler joined the Loyola Law School faculty in 1973 as an untenured member. Before receiving tenure in 1979, her teaching, scholarship and relationships with faculty, administrators and students were thoroughly reviewed by the tenured faculty, by the law school administration and by the University president. In her more than 10 years at Loyola she worked closely with many student research assistants as well as with members of the law review staff. As head of the law school's judicial clerkship program, she also worked closely with more than 200 students in connection with their applications for judicial clerkships. In addition, she served with many colleagues on various faculty committees, including the Curriculum Committee, the Tenure Review Committee, the Student Faculty Relations Committee, and the Faculty Recruiting Committee. Mrs. Liebeler spent a large portion of her professional life at Loyola Law School and never had she heard anyone make statements about her attitude, teaching or relationships with her colleagues or students of the kind reported by CITBA. The committee received many letters from professors at Loyola, including two former deans, as well as former students who spoke highly of Mrs. Liebeler's competence and intelligence as a law school professor and highly endorsed her nomination to the Federal Circuit. It is interesting to note that not one of these individuals was contacted by CITBA, although several were contacted by the ABA.

OTHER CRITICISMS

Several outside organizations have objected to Mrs. Liebeler's nomination because they are unhappy with her decisionmaking in

trade cases at the ITC. As a Commissioner, she has decided many cases, and with each decision she renders, someone will be pleased and another party will be displeased. While criticisms are to be expected from groups that are disappointed in a ruling affecting them, their position on her nomination should be evaluated within that context. It is clear from her record and her testimony before the Judiciary Committee, that she approaches each case with an open mind and renders her decisions based upon her careful application of the applicable statutory criteria to the factual record before her in that case.

Opposition to her nomination also stems from the perception that Mrs. Liebeler is a "free trader" who consistently votes against the domestic industry or domestic workers. The ITC is an independent, quasi-judicial agency that decides injury cases under the import relief laws and her decisions are bound by those statutes. In fact, Mrs. Liebeler has voted in favor of the domestic industry in many ITC cases. In connection with her November 3, 1987, hearing, she furnished the committee with a list of cases in which she voted in favor of the domestic industry in countervailing duty and anti-dumping cases and in cases arising under the escape clause. In fact, she has voted with the majority of the Commission approximately 64 percent of the time. As the only lawyer on the Commission for most of her tenure, however, it is not surprising that her analysis and opinions are sometimes different from those of her colleagues.

THE VERMONT INCIDENT INVOLVING MRS. LIEBELER'S SPOUSE

During her testimony before the Judiciary Committee Mrs. Liebeler responded to concerns raised regarding a 1973 incident in Vermont that involved her husband, who is an attorney and law professor. The incident occurred more than 14 years ago and when Mrs. Liebeler, at the time, was 7 months pregnant. She had accompanied her husband to a building he owned, where pursuant to a provision in the lease expressly giving him the right to do so, he removed and placed into storage the personal property of a tenant who was in arrears in rent. Mr. Liebeler later became involved in a scuffle with the tenant. Although highly tenuous charges of "extortion" were filed against both Mrs. Liebeler and her husband, Susan Liebeler was never prosecuted and the charges against her were dropped (see *Rocray* letter, exhibit "D"). Chairman Liebeler's involvement in this event was at best tangential and there is no question that the decision to remove the tenant's property was made by Mr. Liebeler and that the building in question was the separate property of Mr. Liebeler.

COMMISSION MANAGEMENT ISSUES

It has been suggested by some that Mrs. Liebeler used poor judgement as ITC Chairman in handling a management consulting contract.

In June 1986 during Mrs. Liebeler's chairmanship, the ITC entered into a contract with a management consulting firm that had contracts with many other government agencies. One of the principals of this firm had formerly been employed by another manage-

ment firm that had previously done business dealings with the ITC. This individual also had previous business dealings with Mrs. Liebeler. Based both on the Commission's positive experience with the firm with which this individual was previously associated, as well as her past business experiences with this individual, Chairman Liebeler was confident that the firm would provide able assistance to the Commission.

Mrs. Liebeler was dissatisfied with the report produced by the firm, as were other Commissioners. She met with the firm's principals, demanding a rewrite and further justification for the recommendations provided in the report. When the firm's response to this request was not forthcoming and when Chairman Liebeler discovered possible fraud and misrepresentation in connection with the contract, she referred the matter to the Justice Department and the FBI. In fact at her August 6, 1987, hearing during questioning on this matter, Senator Leahy commended Mrs. Liebeler for her actions when he stated:

I mean, I applaud your turning it over to the Justice Department and everything else. You did everything right there. I'm not suggesting any question otherwise * * *."

Pursuant to the advice of counsel, the Commission withheld payment on the contract until the investigation was closed.

Mrs. Liebeler has been accused of being an ideologue, ignoring the statutory framework of the trade laws and substituting her own analytical structure for that provided by Congress in the Law.

This accusation is inaccurate and misleading at best. It has been alleged that in intellectual property cases arising under section 337 of the Tariff Act of 1930, Commissioner Liebeler applies an injury test which is inconsistent with the interpretation of this statute in decisions of the Court of Appeals for the Federal Circuit. This allegation was originally made by CITBA in its report to the committee and to support it CITBA incorrectly reported the date of one of her opinions and misquoted another by omitting, without indicating they had made an omission, her discussion of the relevant court of appeal decisions on the appropriate injury standard and her application of the relevant standard to the facts of the case.

Commissioner Liebeler's use of a lesser injury test when imports infringe copyrights, trademarks and patents, than for other unfair trade practices not involving intellectual property rights is the injury standard REQUIRED by the court of appeals in *Bally/Midway*, *Textron* and most recently in *Fisher and Porter*.

In *Bally/Midway Mfg. Co. v. U.S.*, 714 F.2d 1117, at 1124 (Fed. Cir. 1983) the CAFC held that:

*Where the unfair trade practice is the infringement of a domestic industry's copyright, trademark, or patent right, even a relatively small loss of sales may establish, under section 337 (a) the requisite injury * * *.*

In its most recent examination of the injury standard, the CAFC stated:

The holder of an intellectual property right has a smaller quantity of proof of injury than would be required in a non-intellectual-property-based case under section 337.

Fisher and Porter, Inc. v. U.S., 831 F.2d 1574 (Fed. Cir. 1987) (emphasis added). This is a reiteration of almost the exact language the court used in *Bally/Midway* and *Textron*:

Both this court and the ITC have acknowledged that the quantum of proof of injury is less in the context of patent, trademark or copyright practices, because the holder of the former type of rights is entitled to exclude competitors entirely from using the intellectual property covered by those rights. (Citing Textron, 753 F.2d at 1029.)

Textron, Inc. v. U.S., 753 F.2d 1019 at 1029 (Fed. Cir. 1986), citing *Bally/Midway*.

In fact, Mrs. Liebeler's methodology in countervailing duty and dumping cases has been supported by many practicing trade attorneys and other trade professionals, including trade law professors, in testimony submitted in support of her nomination.

As Mr. Cunningham wrote in his testimony:

* * * both the statutes and their legislative history make it clear that the Commissioners are not limited to consideration of statutorily-enumerated economic factors, but rather they should consider all other economic factors relevant to the case at hand.

Mr. Greenwald stated:

* * * I think that their efforts to develop a clear and coherent approach in this area of the law should be applauded. There is certainly no basis for concluding that her Title VII decisions cast doubt on her qualification for the bench.

Mr. Greenwald further stated with regard to Chairman Liebeler's title VII decisions:

* * * While her views of these laws and their purposes are at odds with my own views and those held by many other practitioners in the field, it is *wrong* to characterize them as contrary to the law. As an ITC Commissioner, Mrs. Liebeler is bound to consider "all relevant economic factors," including several enumerated in the statute, when reviewing injury allegations in Title VII cases.

And finally, Mr. Greenwald stated:

* * * while the statute directs the ITC to "consider" the full range of factors in determining material injury and causation, the individual ITC commissioners are, in the final analysis, given flexibility to determine which factors they believe to be relevant.

Opponents of Mrs. Liebeler's nomination have also called attention to *USX Corp. v. U.S.* Slip Op. 85-03-000325 (Ct. Int'l Trade, March 15, 1988), a recent decision of the initial reviewing court for ITC cases decided under the antidumping and countervailing duty law where the judge criticized several sections of the Commissioners' decisions, including a part of Mrs. Liebeler's causation analysis, and remanded the case to the Commission. The court's decision is not a final resolution of this case which has been remanded to the Commission for further consideration. Commission Liebeler

and other commissioners will be providing the court with a fuller explanation of their views on cumulation, causation, and the use of elasticity analysis in their opinions on remand.

Commission decisions in dumping and countervailing duty cases are sometimes remanded by the Court of International Trade and on occasion they are reversed. Further review can be had in the Court of Appeals for the Federal Circuit. Mrs. Liebeler's decisions on the ITC have not been remanded more frequently than those of other Commissioners.

CONCLUSION

The Judiciary Committee has thoroughly reviewed all of the criticisms of Mrs. Liebeler and found nothing that would keep her from being confirmed as a U.S. circuit court judge. The committee has the responsibility to determine if Mrs. Liebeler possesses the qualities required of a judge; namely, integrity, judicial temperament and professional competence.

Based upon her responses to questions during her hearings, her excellent qualifications and experience, it is felt that Mrs. Liebeler does possess these attributes and is qualified to serve as U.S. circuit judge for the Federal Circuit. We believe, therefore, that Mrs. Liebeler should be confirmed by the Senate.

STROM THURMOND.
ORRIN HATCH.
ALAN SIMPSON.
CHARLES GRASSLEY.
ARLEN SPECTER.
GORDON HUMPHREY.

EXHIBIT "A"

FREEMAN, WASSERMAN & SCHNEIDER,
New York, NY, January 28, 1988.

Senator JOSEPH R. BIDEN,
Chairman, Committee on the Judiciary, U.S. Senate, Washington,
DC.

Senator STROM THURMOND,
Committee on the Judiciary, U.S. Senate, Washington, DC.

IN SUPPORT OF THE NOMINATION OF SUSAN WITTENBERG
LIEBELER TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DEAR CHAIRMAN BIDEN AND SENATOR THURMOND: This letter supports Chairman Liebeler's nomination. I have specialized in customs and international trade law for over two decades, but this is the first letter which I have written in connection with a nomination to the federal judiciary. This letter is engendered by the disparaging and clumsy testimony presented to your Committee on November 3, 1987 by the President of the Customs and International Trade Bar Association ("CITBA"). Those comments (which I saw only this week for the first time) enraged me, in large measure because of the *ad hominem* nature of the testimony. I am a member of CITBA, but its Directors did not circulate copies of either the written report submitted to your Committee or the testimony.

This letter is unsolicited. I do not know Chairman Liebeler socially and I am not acquainted with any member of her family. I am personally unaware of Chairman Liebeler's political or economic views.

I am a member of the Bars of the State of New York, the State of Florida, the District of Columbia and the U.S. Court of International Trade.

For over 20 years I have appeared regularly before the U.S. International Trade Commission (and the predecessor Tariff Commission). I have continually represented both domestic and foreign interests. I believe that I have appeared before every member of the Commission since 1966. Members and associates of my Firm appear regularly before the Commission, the Court of International Trade and the Court of Appeals for the Federal Circuit.

In contrast, I have reviewed the names of the 17 lawyers who are members of CITBA's Committee on Judicial Selection and Board of Directors. I do not believe that more than four of these individuals have appeared regularly before the Commission and I am satisfied that none has appeared as often as I.

Against this background, I offer the following comments in support of Commissioner Liebeler's nomination. I agree totally with CITBA's recognition of Chairman Liebeler's intelligence. Chairman

Liebeler's conduct of the Commission's public hearings have been consistently fair and balanced (which, incidentally, is no small talent in light of the short time periods available for the conduct of such proceedings, the breadth of the economic and legal issues and the emotions generated in the heat of these adversarial struggles). Chairman Liebeler's oral and written decisions have been lucid and well-reasoned. There is no ambiguity surrounding Chairman Liebeler's opinions—all parties know precisely where she stands on a given issue.

The testimony presented by the CITBA representative opposes Chairman Liebeler's nomination—despite her acknowledged intelligence—because, first, “she appears to reason from very strong convictions or preconceptions”. Needless to say, Congress has statutorily required that Commission members have different political affiliations and the idea that a Commissioner has “very strong convictions” is a necessary virtue, not a vice. With respect to her alleged “preconceptions”, I am unaware of any instance in which I (or any lawyer in my Firm) concluded that Chairman Liebeler had pre-judged or pre-conceived a decision without regard to the facts of the record.

Secondly, and apparently of greater importance, CITBA attacks Chairman Liebeler because her views “often-times are divergent from if not contrary to both statutory and decisional law”. I am unaware of any determination issued by Chairman Liebeler which any court has found contrary to law. While the federal trade courts have routinely remanded determinations reached by a majority of the Commissioners, I am not aware of any decision rendered by Chairman Liebeler which has been identified as unlawful by a court. To the contrary, I believe that Chairman Liebeler's approach to her responsibilities has been exceptionally fair and open. One example will suffice:

During Chairman Liebeler's early days on the Commission, she explained that her analysis would begin with certain presumptions and repeatedly requested all lawyers (and other persons) appearing before her to submit written views on the legality and propriety of these presumptions. In particular, I recall an issue involving Chairman Liebeler's view that she would presume that any import penetration below (I think) two percent of total U.S. consumption was not injurious to the competitive U.S. industry. At that time, there was much gnashing of teeth until it was pointed out that both the Department of Justice and the Federal Trade Commission rely heavily on certain percentages to determine whether to challenge the validity of certain mergers and acquisitions. Indeed, I am unaware of any methodology which Chairman Liebeler has adopted for which she has not first publicly sought the advice of all parties to a particular proceeding and, in most instances, of all persons who regularly appear before the Commission.

Again, I believe that I have appeared before every Commissioner during the past 22 years. I find Chairman Liebeler to be superior in intellect to most of the Commissioners, to be as knowledgeable of the law as any Commissioner, and to be as fair procedurally as any prior Chairman. I am unaware of any instance in which Chairman Liebeler has publicly criticized any law or, in any way, evidenced

anything but respect for the laws of the Nation. I support Chairman Liebeler's nomination and urge that it be approved.

Respectfully submitted,

JACK GUMPert WASSERMAN.

EXHIBIT "B"

INTELLECTUAL PROPERTY OWNERS, INC.,
Washington, DC, November 9, 1987.

Hon. PATRICK J. LEAHY,
Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR LEAHY: I am writing concerning the hearing you chaired on November 3, 1987 on the nomination of Susan W. Liebeler to be a judge on the U.S. Court of Appeals for the Federal Circuit.

Intellectual Property Owners Inc. (IPO) expresses no opinion on whether Ms. Liebeler is qualified for the position for which she has been nominated. The sole purpose of this letter is to comment on pages 13-16 of the prepared statement of David O. Elliott, who testified on behalf of the Customs and International Trade Bar Association.

Pages 13 to 16 of Mr. Elliott's statement are directed to cases under section 337 of the Tariff Act of 1930. Because of the interest of IPO's members in pending legislation to eliminate section 337's requirement for a showing of injury in intellectual property cases, we have followed section 337 rulings rather closely.

Mr. Elliott's statement quotes from opinions of the ITC and the Court of Appeals for the Federal Circuit and concludes as follows:

Mrs. Liebeler's opinions in this area indicate that she does not acknowledge the supremacy of the statute and court decisions over her private views when called upon to perform her public duty as a Commissioner.

I believe the opinions quoted in Mr. Elliott's statement do not support the conclusion drawn.

The first opinion quoted, on page 13, is taken from Mrs. Liebeler's 1985 dissenting opinion in *In the Matter of Certain Optical Waveguide Fibers*, and reads as follows:

Importation of a product which infringes a valid patent will *always* affect the patent holder adversely . . . The Commission should, therefore, employ its most lenient injury test in Section 337 patent cases.

to note that Mr. Elliott is incorrect in assuming *Woodworking Machines* was written in 1987.

The *Woodworking Machines* determination was reached by the ITC in 1985, but publication was delayed until 1987, after the Commission had adjudicated a motion to modify the Commission's final action in the investigation and a petition for reconsideration of the Commissioners' final opinions. See explanatory note preceding table of contents in USITC publication no. 1979. In 1985 the ITC did not have the benefit of the more recent cases of the Federal Circuit interpreting section 337.

The final opinion involving section 337 quoted in Mr. Elliott's statement, on page 15, is by the Federal Circuit in *Corning Glass Works* in 1986. That opinion makes clear that section 337 requires the establishment of more than patent infringement alone to make the required showing of injury. However, Mrs. Liebeler's dissent at the Commission level, referred to at the top of page 16 of Mr. Elliott's statement, is not to the contrary. Her opinion is directed in substantial part to the issue of whether the sales in the United States of the infringing waveguide fibers, although small, posed a real threat to Corning Glass Works. The first part of her statement, while advocating a lenient injury test for patent cases, acknowledges the *Textron* interpretation that injury is required.

In summary, it cannot be concluded from the opinions discussed that Mrs. Liebeler has acted in disregard of the statute or court interpretations of it.

I hope the Committee finds this analysis useful.

Sincerely,

HERBERT C. WARMSLEY,
Executive Director.

EXHIBIT "C"

U.S. INTERNATIONAL TRADE COMMISSION,
Washington, DC, November 10, 1987.

Hon. JOSEPH R. BIDEN,
U.S. Senate,
Washington, DC.

DEAR SENATOR BIDEN: Several months ago two members of the Senate Judiciary Committee staff interviewed me personally and rather extensively regarding Susan Liebeler's nomination to the United States Court of Appeals for the Federal Circuit. As a continuing member of the International Trade Commission, I have hesitated to make public statements on Chairman Liebeler's nomination, even though I enthusiastically support it. And I am not writing now to repeat the strongly favorable comments I made in my long interview with your staff, since I assume that those comments have been ably communicated by your staff to the full Committee. Rather, I am writing to place in its proper context certain testimony which I heard when I attended the Judiciary Committee hearing on Chairman Liebeler's nomination last week.

At the November 3 hearing, I heard representatives of the Customs and International Trade Bar Association (CITBA) testify about work they did in preparing a report on Chairman Liebeler's nomination. There was extended dialogue between Senator Leahy and various bar association witnesses about whether their associations' views were based on "interviews." The CITBA witnesses testified that their report was based on a number of "interviews" of persons who had worked with Ms. Liebeler. I do not know how extensive CITBA's "interviews" of other persons might have been, but I do know that my "interview" consisted only of a brief telephone conversation lasting roughly five minutes with one of CITBA's representatives. I was asked very few questions. I was not asked to respond to criticisms that might have been leveled at

Susan Liebeler, and I was not asked to comment in any detail on my working relationship with her.

Very truly yours,

ANNE E. BRUNSDALE,
Vice Chairman, U.S. International Trade Commission.

EXHIBIT "D"

STATE OF VERMONT,
OFFICE OF THE STATE'S ATTORNEY,
Brattleboro, VT, September 16, 1982.

TO WHOM IT MAY CONCERN: In August 1973 I represented Susan Liebeler in connection with charges for extortion and accessory to extortion filed by the State's Attorney against Mrs. Liebeler. The charges arose out of a dispute Mrs. Liebeler and her husband were having with one of their tenants in their apartment building in Newfane, Vermont. The tenant refused to pay rent or vacate the premises. Acting under a provision in their lease agreement and the Vermont Innkeepers Lien statute, the Liebelers removed the tenant's possessions from the apartment building and placed them in storage.

A young and overzealous State's Attorney then filed charges against Mrs. Liebeler. Mrs. Liebeler pled not guilty and she was released on her own recognizance. She was never prosecuted; the charges were dropped in December, 1973.

This was a civil matter and there was no basis for filing criminal charges against Mrs. Liebeler. A more experienced prosecutor would never have gotten involved. I have served as State's Attorney from 1974 to the present. I would not have filed any charges against Mrs. Liebeler had I been in office at that time.

Please feel free to contact me if you wish to discuss this matter or if I can provide you with any additional information.

Sincerely,

JOHN A. ROCRAY,
State's Attorney.

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